

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10, SUBREGION 11**

**PruittHealth Veteran Services –  
North Carolina, Inc.,**

**Respondent,**

**and**

**Ricky Edward Hentz, an Individual,**

**Petitioner.**

**Case: 10-CA-191492**

**PRUITTHEALTH VETERAN SERVICES – NORTH CAROLINA, INC.’S**

**POST-HEARING BRIEF**

**TO: The Honorable Judge Keltner W. Locke  
Administrative Law Judge  
National Labor Relations Board**

**Dated: October 31, 2017**

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PruittHealth Veteran Services – North Carolina, Inc. (“the Veterans’ Home”) submits this Post-Hearing Brief in Case No. 10-CA-191492.

**I. STATEMENT OF THE CASE**

On May 30, 2017, the Acting Director of the National Labor Relations Board, Region 10, filed a Complaint against the Veterans’ Home. The Complaint, issued under Section 10(b) of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (the “Act”) and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the “Board”), alleges the Veterans’ Home violated the Act by interfering with, restraining, and coercing employees in the exercise of rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) of the Act.

The Complaint alleges that Respondent violated the Act when Justin Morrison, Administrator of the Veterans’ Home, allegedly said, “This is my building and I’ll do what the fuck I want” and “Stay in your lane.” The Complaint alleges these statements pertained to staffing concerns and personnel issues, and that employees were separately advised not to discuss their wages amongst themselves. GC-1 at 14-15, ¶¶ 6-8. The Complaint further alleges

that between October through December 2016, Ricky Hentz concertedly complained to the Veterans' Home about concerns with race discrimination, staffing, and personnel issues and that he was disciplined, demoted and discharged. GC1 at 15, ¶¶ 9-13.

A hearing took place in Asheville, North Carolina on September 12-14, 2017, before Administrative Law Judge Keltner Locke. The evidence at the hearing established that Mr. Morrison did not say, "This is my building and I'll do what the F\_ I want," and that the statement, "Stay in your lane," was a request that Mr. Hentz focus on his job responsibilities, not tell department heads what to do, and not threaten his coworkers. Further, Mr. Hentz was not demoted; rather, he was reassigned with no change in pay from a Scheduler/Certified Nursing Assistant ("CNA") position to a CNA position. Mr. Morrison made that decision because he believed that role would better fit Mr. Hentz's skill set and, as a CNA, Mr. Hentz could work a different shift. During his approximately three months of employment, Mr. Hentz arrived late to work 29 times, neglected to punch the time clock on multiple occasions, and took several lunches shorter than 30 minutes without preapproval in violation of the Veterans' Home's Attendance Policy. According to Mr. Morrison, his manager, Mr. Hentz appeared to "come and go" as he pleased, and Mr. Hentz was disciplined and ultimately discharge for his attendance. The General Counsel has put forth no credible evidence that any of Mr. Hentz's prior complaints motivated these decisions or that the Veterans' Home's legitimate, non-discriminatory reasons for its actions are pretextual. Indeed, although there is evidence that Mr. Hentz called PruittHealth's corporate office in Norcross, Georgia and complained of race discrimination by the Veterans' Home's Activities Director Amy Ferguson, Mr. Morrison did not know the substance of what Mr. Hentz communicated to the corporate office or to the assigned investigator and did not even know that matter pertained to race discrimination until a couple

months before the hearing before Judge Locke from September 12-14, 2017 (which was well *after* Mr. Hentz's termination). Further, Mr. Morrison never understood Mr. Hentz to have shared any group concerns or to have otherwise engaged in protected concerted activity. The Veterans' Home maintains no policies prohibiting discussions of staffing, wages, or terms and conditions of employment, and the record fails to establish anyone being disciplined or terminated for such matters. For all these reasons, and as set forth below, the Region should dismiss the General Counsel's Complaint.

## **II. STATEMENT OF FACTS**

### **A. THE VETERANS' HOME IN BLACK MOUNTAIN, NORTH CAROLINA.**

#### **1. The Veterans' Home Follows a "Committed to Caring" Philosophy and Aims to Provide a Home-Like Environment for Disabled Military Veterans.**

PruittHealth's Veterans' Home in Black Mountain, North Carolina, is a skilled nursing and rehabilitation center that operates through a contract with the State of North Carolina Division of Veterans Affairs. Tr. 15:18-24; 451:10-13; 454:16-18. Residents are elderly, mostly U.S. military veterans, living with conditions such as Alzheimers, cognition disorders, or other mental or physical disabilities. Tr. 451:10-13. Up to 100 residents are cared for with skilled nursing services provided 24 hours per day. Tr. 17:22-19:20; 454:25-455:1.

The Veterans' Home operates under PruittHealth's "Committed to Caring" philosophy, which strives to provide the highest care possible and a home-like atmosphere, where veterans can be comfortable, live in private rooms, and have private bathrooms. Tr. 15:4-7; 452:19-453:3. The Veterans' Home has been recognized by an outside agency (Pinnacle) as "Platinum status," making it one of the highest quality care facilities in the country. Tr. 454:7-10. The

Veterans' Home refers to its employees, at all levels, as "partners" in providing these services. Tr. 350:4-7.

The Veterans' Home is operated by an Administrator, a position held by Justin Morrison, since August 16, 2016. Tr. 459:16-18. The Veterans' Home has five main departments: Nursing, Dietary, Maintenance, Housekeeping, and Laundry, each of which has a Department Manager responsible for running those day-to-day operations. Tr. 20:5-8; 455:13-20. The Director of the Nursing Department from October 24, 2016, to present has been Director of Health Services (the "DHS") Crysta Dickens (a/k/a Crysta Bloomberg). Tr. 671:1-7. From September 1, 2016, until October 31, 2016, Mary Ellen Shephard was the DHS. J-1, at 2 #7.

**2. The Veterans' Home is Staffed Well-Above the Minimum Requirements Set by the Centers for Medicare Services.**

The federal government, specifically the Centers for Medicare Services (CMS), sets minimum expectations regarding the Veterans' Home's staffing levels. Tr. 459:25-460:9. From September 2016 through September 2017, based on PruittHealth's internal quality metrics, which include quality measures and staffing levels, of the 92 facilities operated, with 92 being the lowest and 1 being the highest, the Veterans' Home has moved from scoring in the 80s to being the 5<sup>th</sup> highest-ranking facility in the PruittHealth network. Tr. 458:18-22. Mr. Morrison is unaware of any instance in which the Veterans' Home has not met the minimum staffing expectations set by the government. Tr. 462:8-11.

Mr. Morrison discusses staffing levels on a regular basis. Tr. 464:9-13. The Director of Nursing and the Scheduler are responsible for communicating about staffing levels, including ensuring the facility is meeting its obligations and that staffing levels are appropriate. Tr. 461:3-4. When an employee is unavailable to report to work, he or she is expected to notify the DHS, who notifies the Administrator and the Scheduler. Tr. 465:11-16.

Responsibilities for scheduling for Veterans' Home partners belongs to the facility's Nursing ("RN") Supervisors, Licensed Practical Nurses ("LPNs"), and the Scheduler. Tr. 673:1-5. Nursing Supervisors have responsibilities for adjusting daily staffing sheets to meet residents' needs and can approve a partner's absence from work, and on weekends or after-hours can call staff to try to fill staffing needs. Tr. 674:23-675:3. If a RN Supervisor is unavailable and an employee has to call the facility to report an absence, LPNs can process those requests. Tr. 675:21-676:1.

PruittHealth maintains no policies prohibiting communications about staffing levels, and no one to Mr. Morrison's or Ms. Dickens' knowledge has ever been disciplined for statements regarding staffing. Tr. 324:20-326:16; 461:11-13; 466:4-6; 678:23-25. There have been times when a family member has expressed a concern about a loved one not receiving a service, such as a shower, and there have been times when partners have responded with the excuse: "we don't have enough staff." Tr. 324:20-326:16; 461:11-13; 466:4-6; 678:23-25. Such statements are inaccurate and misleading and may be construed as a lack of care for the resident. Tr. 325:1-15; 677:8-678:10. Mr. Morrison's expectation is that, instead of making an excuse, the partner would provide factual information to the residents or their family members, and in the example referenced, say something to the effect, "I have four other showers today that I have to do, but I will get to your shower at XYZ time, but I will not forget about it." Tr. 461:18-462:1. Similarly, in this scenario, Ms. Dickens expects partners to advise the resident or family member that they are in the middle of a task, but to acknowledge the request and let the resident or family member know that the staff will return promptly. Tr. 677:4-678:2.

Legitimate concerns or questions about matters such as these can be raised through multiple avenues of reporting, including submission of a grievance form, contacting an



ombudsman, the State of North Carolina, the Board of Nursing, or contacting a department head or the Administrator of the facility. Tr. 462:26-463:8. During orientation, the DHS advises new hires that they are welcome to communicate concerns to their supervisor, nurses, RN Supervisors, to her, and the Administrator, and if they are not comfortable doing that, they may anonymously contact PruittHealth's compliance line, which is available 24 hours per day, the Department of Health Services, the Board of Nursing, or the ombudsman. Tr. 680:5-20.

Staffing levels at the Veterans' Home have never, to Mr. Morrison's knowledge, fallen below the legal minimums. Tr. 558:20-25. Employees speak with Mr. Morrison about staffing levels, including which roles need to be filled, on a daily basis. Tr. 558:1-3. Like many companies, the Veterans' Home has turnover. Tr. 558:11-12. To recruit new hires, the Veterans' Home implemented an incentive program where employees who actively referred someone to join the organization could receive an extra payment. Tr. 558:13-24. Mr. Morrison is unaware of any incentive he would have to keep staffing levels low, and he had no concerns about the staffing levels at the Veterans' Home in the fall or winter of 2016. Tr. 560:16-21. Mr. Morrison discussed staffing levels at operations meetings, with the DHS, with corporate. Tr. 560:22-561:13. As Mr. Morrison said, "We were always trying to actively recruit staff and our goal was to always be at the five-star staffing level." Tr. 561:1-3.

### **3. Partners Discuss Compensation at the Veterans' Home Without Consequence.**

Partners discuss various forms of compensation while working for the Veterans' Home, including salaries and hourly rates of pay. Tr. 327:16-18. The Veterans' Home has no policy prohibiting discussion of wages or terms or conditions of employment, and has never disciplined or terminated anyone for discussing wages or terms or conditions of employment. Tr. 328:2-4, 466:4-17; 679:1-680:4.

**4. CNAs Play a Vital Role in Resident Care and Serve as the “Backbone” of the Veterans’ Home.**

The Veterans’ Home provides resident care most directly through Certified Nursing Assistants (“CNAs”), who are the “backbone” of the Veterans’ Home. Tr. 25:8-13; 72:18-73:4; 455:21-456:2; 472:13-20. CNAs help residents with activities of daily living (“ADLs”), including using the restroom, changing clothes, providing meals, shaving, brushing teeth, providing denture care, and similar activities. Tr. 25:8-13; 72:18-73:4; 92:21-24. Further, if a resident has an emergency, the resident can yell or push a call bell, which alerts the CNA, nurse, or others to come help him or her. Tr. 72:18-73:4. If a resident has a medical need and a CNA is taking a break, the CNA may at times be expected to respond appropriately and provide the necessary care. Tr. 73:5-10. Because CNAs play a vital role in resident care, CNAs need to report to work on time, to work their shift, and to provide resident care briefings (a/k/a “pass-ions”) when their shift ends. Tr. 456:11-17; 459:5-12. Failure to do so could result in a resident falling or having a serious medical condition with insufficient help, leaving the resident vulnerable and posing potential consequences with the State for compliance-related infractions and other concerns. Tr. 457:3-13.

**5. The Veterans’ Home’s Attendance Policy Helps Fulfill PruittHealth’s Commitment to Caring.**

The Veterans’ Home has an Attendance Policy, which was in effect since Mr. Morrison joined the Veterans’ Home. Tr. 46:19-21; GC-8. Under the Policy, employees are given occurrences for absences, tardies, leaving early, failure to clock (or “punch”) in and out properly, and related offenses. Tr. 427:6-12; 497:6-498:5; R-10 and GC-8.) Further, employees are required to take a 30-minute lunch break and to properly punch in and out for that and if they leave the Veterans’ Home property. Tr. 48:2-4. However, a short lunch may not violate the

Attendance Policy if it was pre-approved based on an urgent need in the facility or other extenuating circumstances (such as being away from the facility for the day). Tr. 49:2-5; 501:14-24. CNAs who respond appropriately and provide necessary care to residents during their breaks may be excused from the lunch break requirements that day. Tr. 73:5-10. Others in the Veterans' Home also play a critical role in providing patient care and are expected to sacrifice taking a full 30-minute lunch period at times based on resident needs. Tr. 74:9-13. Under the policy, unexcused absences may result in disciplinary action up to termination. Tr. 49:2-5; 501:14-24. Employees are expected to report to work on time each day they are scheduled and work their entire shift and follow the Attendance Policy. Tr. 430:3-18. The Veterans' Home does not maintain any grace period, and it is not acceptable to be late to work. Tr. 567:7-13.

All partners are expected to provide accurate and truthful information regarding their time and attendance. Tr. 441-42; 562-63. Providing false or misleading information in a partner's time and attendance records is grounds for discipline and can and has led to termination of employment with PruittHealth. Tr. 441, 563-64.

In the fall of 2016, PruittHealth's corporate office in Norcross, Georgia encouraged all facilities to comply with the Attendance Policy and hold employees accountable, including for compliance with meal period requirements. Tr. 433:20-434:3. Mr. Morrison reviewed time card reports weekly and sent daily reports to PruittHealth's corporate office for any instances of missed punches. Tr. 81:22-82:1. Mr. Morrison also managed and held department managers accountable for enforcing this policy within their departments. Tr. 81:14-21.

In determining what level of discipline is appropriate under the Attendance Policy, Mr. Morrison considered the circumstances, including emergencies and whether the residents had severe medical needs, the partner's job performance, and the Veterans' Home's mission of

caring. Tr. 82:2-23. Potential consequences for violating the Attendance Policy include a verbal warning, a written warning, final warning, and termination. Tr. at 83:18-84:9. The Veterans' Home also maintains a Progressive Corrective Action Policy, which identifies steps in the disciplinary process and provides flexibility to administer such steps in the manner deemed appropriate and with support from the Human Resources Department. Tr. 474:3-475:7; 613:9-314:5; R-12.

**B. RICKY HENTZ'S EMPLOYMENT WITH THE VETERANS' HOME**

**1. Ricky Hentz Joins the Veterans' Home.**

Ricky Hentz held the position of Scheduler/CNA beginning on September 20, 2016. Tr. 26:13-27:10; 91:22-23. In that capacity, Mr. Hentz assisted the Veterans' Home by scheduling employees on the floor and serving as a CNA when needed. Tr. 27:6-10. Ninety percent of Mr. Hentz' time was spent as a Scheduler; ten percent was spent as a CNA. Tr. 90:9-13; 202:9-13. There are times when the services of a CNA were needed with little to no advance warning, such as if another CNA failed to report to work, thereby causing a hardship on the facility. Tr. 469:4-6. CNAs are staffed 24/7 and are expected to report to work on time to relieve the prior shift. Tr. 200:23-201:1.

As the Scheduler, Mr. Hentz was expected to communicate regularly with Mr. Morrison regarding scheduling. Tr. 469:11-21. Mr. Hentz was also responsible for filling open positions on the work schedule by contacting partners to fill-in. Tr. 27:11-13. Mr. Hentz was responsible for looking at a master schedule created by the DHS or the RN Supervisor and transferring information on a daily and weekly basis to the schedule. Tr. 32:22-33:4, 9:3-8. The main purpose of the daily staffing sheet was for the DHS and the RN Supervisors to have information for an 8- to 12- hour period of who they could expect to be working that day. Tr. at 33:17-21.

The Scheduler uses the daily staffing sheet to determine what shifts needed to be filled when staff members calls in advance to be out of work (“call outs”) or do not report to work as assigned. Tr. at 36:4-8.

The Scheduler lacks authority to excuse anyone from coming into work and, instead, such responsibility would belong to the department manager. Tr. 86:6-8; 469:24-271:13. The Scheduler also lacks authority to order anyone to come to work on their days off. Tr. 470:6-8. Schedulers lack authority to make deals or trades with partners, agreeing to give them one shift if they work another. Tr. 676:5-15.

**2. Mr. Hentz Does Not Follow the Attendance Policy, and Mr. Morrison Fires Mr. Hentz’s Manager, Mary Ellen Shephard, For Reasons Including her Failure to Enforce the Attendance Policy.**

On September 24, 2016, Mr. Hentz missed a punch at the time clock. Tr. 205:8-9; R-3. On September 26, 2016, Mr. Hentz forgot his employee ID and missed another punch. Tr. 206:3-4; R-3. On September 27, 2016, Mr. Hentz forgot to punch in from lunch. Tr. 207:15-18; R-3. On October 5, 2016, Mr. Hentz forgot to punch in or out for lunch. Tr. 209:23-210:3; R-3.

Mr. Hentz understood that, absent an approval from the company, an employee could be disciplined for not taking a 30-minute lunch break. Tr. 198:2-11. Mr. Hentz does not recall ever requesting pre-approval to not take a lunch break. Tr. 194:1-19. According to the Veterans’ Home’s records, on October 6 and 11, 2016, Mr. Hentz did not take a lunch break. Tr. at 220:2-25; R-3. On October 19, 2016, Mr. Hentz attended a staff meeting in which Mr. Morrison discussed employee accountability under the Attendance Policy, including for missed punches and short lunches, asking employees to adhere to the lunch break and clock punching expectations. Tr. 213:10-21; 502:14-503:24; 573:6-574:15; R-4. On October 25 and 26, 2016, Mr. Hentz missed at least one punch each day. Tr. 216:19-218:11; 511:1-512:2; R-6.

Around the same time, Mr. Morrison hired Crysta Dickens, whose first day of work was October 24, 2016, and terminated the employment of Mary Ellen Shephard, whose last day of employment was October 31, 2016. J-1 at 2, #7; Tr. 75:23-76:10; 467:22-24; 671:2-7. Mr. Morrison terminated Ms. Shephard's employment for several reasons, including her not holding partners accountable under the Attendance Policy. Tr. 76:8-16; 467:6-8. In Mr. Morrison's words, "I felt like she was not . . . making sure we were providing the highest level of care, which means that partners need to be on time, they need to be at work, and they need to be ready to assist the residents." Tr. 76:11-16; 467:6-8. Mr. Morrison had also discovered numerous instances in which the schedule Mr. Hentz had created was not accurate, and Ms. Shephard had failed to hold Mr. Hentz accountable. Tr. 492:2-9. When Mr. Hentz began working at the facility, he reported to Ms. Shephard and would have reported to Ms. Dickens upon her hire, but instead Mr. Morrison directed Ms. Dickens to first learn PruittHealth's policies and procedures, and Mr. Morrison agreed to manage Mr. Hentz's employment. Tr. 77:17-22; 468:3-18.

**3. Mr. Hentz Fails to Follow Mr. Morrison's Instructions Regarding the Order for Seeking Volunteers to Fill Vacancies.**

When additional help was needed at the Veterans' Home, Mr. Morrison advised Mr. Hentz approximately 2-3 days per week and on multiple occasions that Mr. Hentz was expected to call, in order of priority,

- (1) the "as needed" staff first; then, if needed,
- (2) partners regularly assigned to the shift on which there was a vacancy, and go through the list of those partners to request help; then, if needed,
- (3) ask partners working on the floor if they would be willing to pick up an additional shift or stay late.

Tr. 470:9-471:13. Further, the Scheduler (Mr. Hentz) could also be expected to work on the floor to help out, as needed. Tr. 470:18-471:13. Mr. Morrison discussed these performance expectations with Mr. Hentz “multiple, multiple times.” Tr. 495:25-496:2.

Mr. Morrison also told Mr. Hentz that, if there are vacancies in the schedule and a nurse is willing to work as a CNA it would be approved on a case-by-case basis, but they were never to be mandated to do that work. Tr. 87:25-88:4. On a weekly basis, Mr. Morrison instructed Mr. Hentz not to call nurses to require they work as CNAs, but Mr. Hentz did not follow that instruction. Tr. 86:6-88:4; 598:7-17. Further, Mr. Morrison understood that Mr. Hentz had refused to call some partners who were on an “as needed” or PRN list, even though Mr. Morrison had instructed those partners to be called. Tr. 88:21-89:3.

According to Mr. Hentz, he told Mr. Morrison about staffing concerns (meaning a schedule less than what the facility had considered “full”), and Mr. Morrison responded that the facility was working on it, and trying to hire some additional people and conduct interviews. Tr. 114:10-117:2; 245:22-246:13. The response Mr. Morrison provided was the one Mr. Hentz had expected, because all Mr. Hentz expected to happen was for the Veterans’ Home to hire more people. Tr. 248:14-249:4. Mr. Hentz had communications about staffing with Linda Brinson, Tiffanie Robinson, Toya Fleming, Marie Williams, Danielle Jeter, Danisa Taylor, and others, but never referenced these individuals by name to Mr. Morrison in connection with any concerns or complaints. Tr. 242:5-243:1. Mr. Hentz did not use anyone else’s names during these conversations with Mr. Morrison. Tr. 115:3-15.

**4. Nursing Supervisor Tonya Gray Complains to Mr. Morrison About Instructions Provided by Mr. Hentz, Relaying Her Concerns and Reporting Others' Concerns.**

As a Scheduler, Mr. Hentz was responsible for working and coordinating frequently with Nursing Supervisor Tonya Gray, who was familiar with residents' medical needs. Tr. 225:2-3; 646:1-4. Ms. Gray was responsible for ensuring that residents' medical needs were met by the staff available and the assigned staffing levels adequate given residents' acuity levels (i.e., their degrees of illness). Tr. 642:14-644:14.

In mid-October 2016, Mr. Hentz, in an authoritative and threatening tone, told Ms. Gray that she was not allowed to change the schedule and that if she did change it, she could be terminated. Tr. 647:22-647:6; 650:11-23. Ms. Gray understood that CNAs were not allowed to supervise RNs according to the North Carolina Board of Nursing. Tr. 647:17-18. Ms. Gray was concerned that inability to change the schedule to meet residents' needs would put them at risk. Tr. 648:20-648:3, 650:21-23.

Shortly thereafter, Ms. Gray reported to Mr. Morrison that she was worried about being able to maintain her nursing license based on the information Mr. Hentz had shared. Tr. 648:8-649:1. Mr. Morrison understood Ms. Gray to be sincere and upset about the information Mr. Hentz had shared, and Mr. Morrison considered Mr. Gray's request to adjust the schedule reasonable. Tr. 516:4-517:7. Mr. Morrison responded, stating that, as Nursing Supervisors, Ms. Gray and others were allowed to change the schedule to meet the residents' needs, which were the Veterans' Home's priority. Tr. 649:2-7.

Ms. Gray also heard approximately 30 other partners complain about Mr. Hentz, and Ms. Gray shared those complaints too with Mr. Morrison. Tr. 651:22-25. Ms. Gray advised Mr. Morrison that other RN Supervisors had voiced concerns about not being able to change the



schedule to meet the facility's needs, that LPNs had concerns they could not speak with the Scheduler about the needs of their unit because they were not able to give continuity of care because they were being scheduled to work frequently on different units. Tr. 652:4-13. The information Ms. Gray provided to Mr. Morrison was true to the best of her knowledge and motivated by a concern for the residents. Tr. 652:14-16.

**5. Multiple Nurses Complain Directly to Mr. Morrison About Mr. Hentz.**

In the fall of 2016, Mr. Morrison received complaints on a weekly basis from nurses, CNAs, and Nursing Supervisors (including Julia Connor, Mary Bosenberry, Tonya Gray, and Frank McIlrath), regarding Mr. Hentz's job performance as a Scheduler. Tr. 485:15-20; 491:10-17, 517:5-520:4. In November 2016, Mr. Morrison met with the Nursing Supervisors in the assembly room of the Veterans' Home to discuss these concerns (the "Nursing Supervisors' Meeting"). Tr. 485:23-486:22. The Nursing Supervisors had called the meeting and Mr. Morrison "gave them the floor" to speak. Tr. 486:14-22. At that time, they raised a multitude of issues, including (1) instances when partners were scheduled improperly, (2) reportedly feeling as though Mr. Hentz had harassed them and spoken to them in an unprofessional manner, as though he was their boss or superior to them, and (3) ordering CNAs to report into work. Tr. 486:16-22; 517:8-527:22.

Mr. Morrison talked with Mr. Hentz on multiple occasions about the concerns raised by staff and coached Mr. Hentz on his expectations of a Scheduler (i.e., relaying accurate information). Tr. 486:16-22; 490:5-23; 517:8-527:22. Mr. Hentz responded, in Mr. Morrison's view, "the way he normally did which was kind of like, yeah, I've got you, okay, and just walk off." Tr. 490:18-20. Mr. Morrison was not satisfied with that response. Tr. 490:21-23.

**6. Carol Penland Quits Her Job, Citing Inappropriate and Threatening Communications from Mr. Hentz.**

Mr. Hentz was not a member of management and, therefore, had no authority to hire, fire, or discipline. Tr. 228:22-229:2. Nonetheless, according to information provided to Mr. Morrison, Mr. Hentz called a CNA (Carol Penland) and threatened her on her day off from work that if she did not come into work, she would be fired. Tr. 86:17-87:5; 487:3-10. The following day, Mr. Morrison called Ms. Penland, who sounded upset, and she reported that she did not appreciate the way she had been treated, reciting again that the DHS had approved her being away from work, and that Mr. Hentz had told her that if she did not come into work, she would be fired. Tr. 487:19-488:9. Mr. Morrison was troubled by Ms. Penland's statements and observed they were similar to the concerns raised in the Nursing Supervisors' Meeting. Tr. 488:10-14. Mr. Morrison apologized to Ms. Penland for that experience and asked if she would return to work, but Ms. Penland refused and said she felt threatened by Mr. Hentz and would "not work in that environment." Tr. 602:25-603:3.

Mr. Hentz admitted to Mr. Morrison that he had directed Ms. Penland to come to work and had mentioned a termination, but claimed it was not a threat, which Mr. Morrison suspected was not true. Tr. 489:13-21. Mr. Morrison was suspicious of the explanation Mr. Hentz offered because another staff member, Amy Conrad, had shared with Mr. Morrison similar concerns about Mr. Hentz contacting her on her time off. Tr. 489:25-490:4. On November 4, 2016, Mr. Morrison issued Mr. Hentz discipline for overstepping his bounds as a Scheduler. Tr. 40:11-13; GC-4.

**7. Mr. Hentz Is Coached About Eating Ice Cream in a Common Area and Calls PruittHealth's Corporate Office to Complain, Insisting "I'm Here to Talk About Me."**

Mr. Morrison expects that any food employees consume be done in designated areas, which are break rooms on each side of the wings, an outside eating area, and an outside patio. Tr. 475:8-12. Mr. Morrison set this expectation to be respectful of the Veterans' Home being the residents' home and based on infection control standards applicable to the facility,<sup>1</sup> which prohibit consumption of food in residents' "household" area, such as the front lobby. Tr. 475:22-476:5; R-13.) In the past, residents have complained to Mr. Morrison about employees eating food that they were not allowed to eat and the perceived, demonstrated lack of respect. Tr. 478:24-479:4.

On or about November 4, 2016, Activities Director Amy Ferguson issued Mr. Hentz some coaching for eating ice cream in a common area. Tr. 127:12-19; 132:3-5; GC-5. Ms. Ferguson advised Mr. Hentz that food is to be consumed in the break room. Tr. 133:3-5. According to Mr. Morrison, Mr. Hentz called him and complained about being given a coaching for eating ice cream and reported being singled out; Mr. Morrison has no recollection of Mr. Hentz ever referring to any racial bias during this call. Tr. 481:6-15; 622:7-11. Mr. Morrison responded that he was out of the office and advised Mr. Hentz that he could call PruittHealth's corporate office in Norcross, Georgia to discuss his concern. Tr. 480:23-481:15; 622:2-20. PruittHealth maintains an anti-harassment policy, which identifies means of investigation and reporting alleged wrongdoing. Tr. 352:6-11; R-8.

Thereafter, Mr. Morrison returned to the Veterans' Home and asked Ms. Ferguson about the coaching she provided, and Ms. Ferguson stated that she commonly provided this coaching,

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<sup>1</sup> Facility compliance with infection control practices is subject to auditing by the State of North Carolina. Tr. 479-80.

and Mr. Morrison believed she had grounds to do so for Mr. Hentz. Tr. 482:7-12. Mr. Morrison had in the past seen employees consume food in common areas and had provided them with coachings as well. Tr. 484:21-485:2. Mr. Morrison has never seen an employee consume food in a common area and not talked with that employee or issued discipline. Tr. 485:3-6.

On November 7, 2016, Mr. Hentz called PruittHealth's corporate office to complain about the write-up and alleged race discrimination. Tr. 145:2-4. In response, Regional Partner Services Manager Tammy Ellis called Mr. Hentz to follow-up on his reported concern. Tr. 146:2-4; 420:11-14. Mr. Hentz spoke with Ms. Ellis, who offered possible explanations for the behavior Mr. Hentz reported. Tr. 234:6-8. Ms. Ellis asked Mr. Hentz to list the employees he had spoken with about race discrimination, but Mr. Hentz declined to do. Tr. 251:22-252:19. Ms. Ellis asked Mr. Hentz for examples of race discrimination in the facility. Tr. 420:15-421:7. The examples he provided were (1) eating ice cream in an area one is not supposed to eat ice cream in, (2) not saying good morning in the hallway, and (3) some individuals being allowed to dress differently than others. Tr. 421:1-7; 424:22-425:1. Then Mr. Hentz said, in an aggressive tone, "I'm sorry they didn't just call me a Nigger and make this easy for you." Tr. 234:14-235:9. Ms. Ellis considered that statement inappropriate and disrespectful. Tr. 421:21-23.

Mr. Hentz reported to Ms. Ellis that he believed Ms. Ferguson was racist. Tr. 146:11-14. Ms. Ellis advised Mr. Hentz that the Veterans' Home did not tolerate race discrimination and that a thorough investigation would be conducted. Tr. 147:13-16. Ms. Ellis asked Regional Partner Services Manager Della Mervin to assist with the investigation into Mr. Hentz's reported concerns, and the scope of Ms. Mervin's investigation was focused on determining whether Mr. Hentz had been affected by race discrimination. Tr. 352:21-24; 359:9-14. Ms. Mervin conducted witness interviews in-person at the Veterans' Home on November 21, 2016. Tr.

355:16-21. In speaking with Ms. Mervin, Mr. Hentz reported that he did not feel Mr. Morrison had discriminated against him, just the Activities Director. Tr. 357:4-9. Mr. Hentz claimed that because other employees were allowed to eat cookies, he should be allowed to eat ice cream. Tr. 385:20-24. Mr. Hentz also reported that when he tried to follow instructions issued by Mr. Morrison, he would be coached or disciplined, and that he was disciplined because nurses were complaining about him. Tr. 362:21-363:6; 400:5-10; 402:6-10.

During the investigation, Ms. Mervin spoke with Carol Penland, who reported that Mr. Hentz had left her what Ms. Penland referred to as “two nasty voicemails,” describing them as being insistent that she come to work. Tr. 404:24-405:9. Ms. Mervin also interviewed Ms. Ferguson and Linda Brinson. Tr. 359:15-23. Ms. Ferguson reported that Mr. Hentz’s consumption of ice cream in the common area was disrespectful. Tr. 360:19-361:5. Ms. Mervin interviewed Linda Brinson, who also reported concerns about Ms. Ferguson, but Ms. Brinson stated she did not believe those issues were tied to race. Tr. 361:20-22. No one that Ms. Mervin spoke with expressed any support for Mr. Hentz or his concerns. Tr. 414:18-21.

During this investigation, Mr. Hentz never raised issues about pay, staffing (other than that being his role), or the parameters of his employment. Tr. 364:1-8. While Mr. Hentz referenced other individuals at the facility who could be interviewed, he said, “I’m not here to talk about them. I’m here to talk about me.” Tr. 364:21-23; 370:1-3; 373:16-375:19; 379:14-21; 384:1-4. Ms. Mervin spoke with 8-10 other employees and none of them had any concerns about the facility. Tr. 371:11-12. As part of her investigation, Ms. Mervin also reviewed every discipline action issued by the Veterans’ Home. Tr. 381:9-11.

Based on the information gathered in her investigation, Ms. Mervin was unable to substantiate a concern about race discrimination. Tr. 366:17-20; 414:22-415:3; 425:6-10. Ms.

Mervin did conclude that Ms. Ferguson needed supervisory training on how to interact with partners at the facility, but that was not tied to race. Tr. 414:22-415:3. Ms. Mervin further concluded that, while cookies were available for residents and others, the ice cream had not been made available to residents. Tr. 386:9-14.

From Mr. Morrison's perspective, it is very common for employees from PruittHealth's corporate office in Norcross, Georgia to visit the Veterans' Home. Tr. 564:5-8. Mr. Morrison understood that Mr. Hentz had called PruittHealth's corporate office, and that an investigation was conducted into that concern, but Mr. Morrison did not know when that investigation took place, the subject of the investigation, or what was communicated by or to Mr. Hentz. Tr. 44:17-19; 84:10-23; 481:6-20; 556:2-25; 621:4-10. Ms. Mervin did not share information as to who had raised a concern or what the nature of that concern was. Tr. 365:9-13; 368:4-10. Similarly, Ms. Ellis did not discuss the investigation with Mr. Morrison. Tr. 425:6-13. Mr. Morrison and Mr. Hentz did not discuss the call Mr. Hentz had placed to PruittHealth's corporate office upon Mr. Morrison's return to the office. Tr. 251:7-10.

#### **8. Mr. Hentz Continues to Perform in an Unacceptable Manner.**

On November 8, 2016, Mr. Hentz attended a meeting for CNAs. Tr. 215:16-20. In that meeting, Mr. Morrison discussed accountability and the Attendance Policy, including missed punches, short lunches and long lunches. Tr. 215:22-216:1; 506:20-507:12.

On November 11, 2016, Mr. Hentz missed a punch. Tr. 218:17-19; R-6. On November 14, 2016, Mr. Hentz took a short lunch and left work without authorization from Mr. Morrison or Ms. Dickens. Tr. 159:19-160:8; 561:25-562:1; 705:1-12. Mr. Hentz claims that on this date he went to a VA hospital at the request of Nurse Navigator Jennifer Horton. Tr. 157:11-160:4. Per Mr. Morrison, Mr. Hentz never talked with him about being asked to go to the VA hospital on

November 14, 2016. Tr. 562:8-10. According to Mr. Morrison, approval for Mr. Hentz to leave the facility on an approved short leave, such as one to a VA hospital, would need to come from either Mr. Morrison or the DHS (Ms. Dickens) or, if both Mr. Morrison and Ms. Dickens are out, then from House Manager Tonya Holderman. Tr. 562:2-7. Per Mr. Morrison, Ms. Horton has no authority to excuse employees from taking lunch breaks. Tr. 561:10-12. No record evidence shows Mr. Hentz having consulted with or obtained approval from Ms. Holderman to go to the VA hospital on November 14, 2016 (or that Mr. Morrison had grounds to believe or did believe that Ms. Holderman had approved any such trip in Mr. Morrison and/or Ms. Dickens' absence).

On November 15, 2016, Mr. Hentz completed a missing punch form, and Mr. Hentz does not recall the reason why, but admits that there is no need to fill out a missing punch form absent a having missed a punch. Tr. 210:9-212:10. With respect to the information provided on his missing punch form dated November 15, 2016, in which Mr. Hentz represented to the Veterans' Home that he went to lunch at 11:17 and returned from lunch at 11:47, per Mr. Hentz, "it could have been one of the times in which I actually didn't get a lunch but it was easier to say I did." Tr. 211:2-8; R-3. This statement suggests, if not admits, that Mr. Hentz provided false or misleading information to PruittHealth regarding his work time.<sup>2</sup>

Missed punch reports are posted by the time clock at the Veterans' Home by Human Resources Manager Melissa Ellege. Tr. 633:11-14, 636:4-7; GC-17. For the period of November 6-19, 2016, only two of Mr. Morrison's direct reports appeared on that report: Ms. Ferguson and Mr. Hentz. Tr. 636:8-13; GC-17. Mr. Morrison made short lunches a daily topic in his staff meeting for his direct reports, one of whom was Ms. Ferguson. Tr. 636:20-23. Mr. Morrison also spoke with Ms. Ferguson about the instances in which she had not followed the

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<sup>2</sup> Had Ms. Dickens learned that Mr. Hentz had submitted false or misleading time and attendance records, she would have consulted with Mr. Morrison and the Company's Human Resources Department for guidance and believes such action would be grounds for termination. Tr. 707:24-708:6.

Attendance Policy. Tr. 636:24-637:2. On several occasions, Ms. Ferguson was out of the building for an activity – to a restaurant or for a resident outing, such as to an apple orchard. Tr. 637:3-9. Mr. Morrison approved Ms. Ferguson having short lunches in these instances because she communicated with him about them in advance and would even give Mr. Morrison a calendar for a month or a couple weeks of upcoming issues to obtain pre-approvals for short lunches. Tr. 637:13-18. In contrast, Mr. Hentz never obtained a pre-approval to take a lunch break shorter than 30 minutes. Tr. 637:22-24.

On November 21, 2016, Mr. Morrison issued Mr. Hentz discipline for a pattern of attendance infractions – specifically, missed punches or missed lunch reports – and provided him with a time card report. Tr. 45:16-46:12; 156:15-16; 514:3-23; GC-7 & 10. Mr. Morrison issued Mr. Hentz this discipline based on a pattern of attendance issues that Mr. Morrison had with Mr. Hentz and to give him a final warning to address them. Tr. 513:24-514:10. Mr. Morrison explained to Mr. Hentz that he needed to clock out for lunch. Tr. 157:7-10. On the discipline form, Mr. Morrison listed dates illustrating a pattern of attendance issues. Tr. 514:16-18. Mr. Morrison advised Mr. Hentz that by not taking lunch breaks he was causing unnecessary overtime. Tr. 157:19-23. In fact, Mr. Morrison had multiple conversations per week in November and December 2016 with Mr. Hentz about Mr. Morrison's expectations of him under the Attendance Policy, including discussions about short lunches, no lunches, missed punches, and tardies, noting that PruittHealth's corporate office was reviewing these records thoroughly, and that violations could result in termination. Tr. 498:4-499:12. Mr. Hentz responded that he understood the Policy. Tr. 499:15-17. Nonetheless, on November 22 and 26, 2016, Mr. Hentz did not take a lunch break. Tr. 221:23-222:2, 223:19-224:16.



**9. Complaints About Mr. Hentz Persist, and Mr. Morrison Assigns Mr. Hentz to a CNA Role.**

Despite receiving directions otherwise from Mr. Morrison, Mr. Hentz continued to tell Ms. Gray that she could not make changes to the schedule. Tr. 666:14-17. Ms. Gray then went back to Mr. Morrison a second time to talk with him *again* about what was happening. Tr. 666:18-20. Mr. Morrison responded by advising Ms. Gray that RN Supervisors were allowed to make changes to the schedule to meet the residents' needs, which was the same information Mr. Morrison shared with Ms. Gray after her first complaint about Mr. Hentz. Tr. 668:6-15. Ms. Gray made the changes to the schedule that she believed were necessary to care for the residents, despite Mr. Hentz's orders otherwise. Tr. 669:15-18. On a daily basis, Mr. Morrison received reports about Mr. Hentz's unprofessional behavior. Tr. 607:14-17. In December, Mr. Morrison directed Mr. Hentz to "stay in his lane," meaning his job was to work on the schedule, not tell department heads what to do, and not threaten his coworkers.<sup>3</sup> Tr. 557:21-558:4.

Between December 2 and 4, 2016, Nursing Supervisor Mary Bossenberry reported to Mr. Morrison that there were multiple scheduling errors over the weekend. Tr. 528:1-9, 534:21-22. In researching the matter, Mr. Morrison discovered that Mr. Hentz had put inaccurate information on the schedule. Tr. 528:16-18. On or about December 5, 2016, after consulting with Ms. Dickens and PruittHealth's Human Resources Department, Mr. Morrison removed Mr. Hentz's responsibilities for scheduling and offered him a position as a CNA with no change in pay. Tr. 163:4-9; 238:22-24; 529:15-531:14; 532:3-7.<sup>4</sup> Mr. Morrison decided to reassign Mr.

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<sup>3</sup> Mr. Hentz alleges that he had a conversation with someone named "Brandi" in which he reported that Brandi was upset because she was not able to do something that John was and that Mr. Morrison responded, "Stay in your lane; those are Brandi's problems, tell her to go see Missy Ellege [the HR manager] and Mary Ellen Shephard [the DHS]." Tr. 125:25-126:6. There is no evidence offered that Mr. Hentz's statement was expressed as a group complaint or that Brandi or anyone else was disciplined in any way. Tr. 126:17-127:5.

<sup>4</sup> After the change in Mr. Hentz's responsibilities, Mr. Morrison heard reports that, when he had worked as a Scheduler, Mr. Hentz was making "deals" with employees about their work schedules. Tr. 605:10-14. Having

Hentz to a CNA role because Mr. Morrison believed that role would better fit his skill set, because at that point Mr. Morrison had not received any prior complaints about Mr. Hentz's patient care, whereas there were multiple issues, performance and attendance, and as a CNA Mr. Hentz could choose to work a different shift. Tr. 529:15-531:1.

Mr. Morrison advised Mr. Hentz that, because there were too many problems with the schedule and additional errors could not be sustained, Mr. Hentz was going to be assigned to work on the floor as a CNA. Tr. 164:2-18; 529:15-503:7. Mr. Morrison told Mr. Hentz that he wanted him to continue to work at the Veterans' Home. Tr. 164:15-18. The events that happened next are disputed. According to the first version of events offered by Mr. Hentz, after this conversation, Mr. Hentz said, "I told [Mr. Morrison] I'd think about it. And he said okay. And I left, and went back to my office." Tr. 164:23-24. On cross-examination, when confronted with PruittHealth's time records, showing Mr. Hentz that he had clocked out for work at 3:07 pm on December 5, 2016, Mr. Hentz changed his testimony, offering a dramatically different second version of events, claiming apparently for the first time, "December 5<sup>th</sup>, that was when [Mr. Morrison] told me – when he came into the office and he snatched all the things, he said why don't you just clock out and go home. That's why I clocked out at 3:07." Tr. 238:11-239:2; R-7. According to Mr. Morrison, on December 5, 2016, Mr. Hentz raised his voice, threw his arms around, and stormed out of Mr. Morrison's office. Tr. 531:2-5. Mr. Morrison considered Mr. Hentz's behavior inappropriate and unprofessional, but decided not to terminate on the grounds that he believed Mr. Hentz would likely calm down. Tr. 532:2-10.<sup>5</sup> Thereafter, Mr. Morrison updated PruittHealth's HR Department and Mr. Morrison's supervisor, Dawn Wilson, on these

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already removed Mr. Hentz's scheduling responsibilities, Mr. Morrison declined to review these additional complaints about Mr. Hentz. Tr. 605:10-14.

<sup>5</sup> On multiple occasions in the past, Mr. Hentz had refused to accept corrective actions or coachings, would become upset, and would storm out of Mr. Morrison's office. Tr. 606:14-607:6.

events, and they indicated to Mr. Morrison that Mr. Hentz's behavior should have been interpreted as a resignation and that Mr. Hentz should have been terminated. Tr. 533:25-534:4.

Mr. Hentz subsequently accepted the CNA position. Tr. 171:18-22. Mr. Hentz now admits that he may have made scheduling mistakes. Tr. 257:8-14.<sup>6</sup>

## **C. EVENTS CULMINATING IN MR. HENTZ'S TERMINATION**

### **1. On December 9, 2016, a Resident Complains About Mr. Hentz.**

On December 9, 2016, Ms. Bossenberry, Nursing Supervisor, called Mr. Morrison and reported that Mr. Hentz did not appear for his 2:00 pm shift and that she needed help. Tr. 534:20-535:2. Mr. Hentz clocked in for work on December 9, 2016, at 2:26 pm. Tr. 570:14-18; R-7. Mr. Morrison said he would come assist, approximately 5-10 minutes after receiving Ms. Bossenberry's call. Mr. Morrison walked down the hall and noticed that Mr. Hentz was at work, but appeared to be "charting" information, which did not make sense to him because Mr. Hentz could not have provided any patient services to capture on a chart if he had just arrived at work. Tr. 534:5-16; 608:21-609:2. During this time, a resident's call light was going off. Tr. 534:5-536:15. Mr. Morrison entered the resident's room, and the resident reported he did not want Mr. Hentz to care for him because, when Mr. Hentz does, he would come into his room, turn off the call bell light and leave without providing care. Tr. 535:18-536:15. The resident, who had never made similar statements about other employees at the Veterans' Home to Mr. Morrison's knowledge, appeared to be sincere and in need. Tr. 536:4-6. Mr. Morrison apologized to the

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<sup>6</sup> In November 2016, Ms. Dickens started to initial the schedules that Mr. Hentz created for two reasons: (1) because Mr. Hentz asked her to do that, and (2) because of the volume of complaints raised by the nursing staff about the schedule. Tr. 592:3-9; 71:18-75:7. Ms. Dickens, however, expected Mr. Hentz to be able to create these schedules on his own and without that oversight. Tr. 716:1-717:4. In fact, Mr. Hentz's replacement, Julie Munday, has the same responsibilities as were assigned to Mr. Hentz, and Ms. Munday has been able to perform her job duties independently. Tr. 718:11-21. In any event, Mr. Morrison was unaware of Mr. Hentz having presented schedules to Ms. Dickens for review after November 4, 2016. Tr. 718:2-14. Regardless, there were times between November 1, 2016 and December 1, 2016, when Mr. Hentz changed the schedule without Ms. Dickens's approval. Tr. 594:18-595:3. This occurred when Mary Bossenberry reported to Mr. Morrison that the schedule was not correct and when a multitude of nurses complained about Mr. Hentz. Tr. 595:12-17.

resident and walked toward Mr. Hentz, asking him (1) why was he late and (2) why did he not respond to the call light, at which point Mr. Hentz rose his arms, appeared upset, said “[I] can’t deal with this anymore, I’m done,” and started to make a scene. Tr. 537:3-13. Mr. Morrison advised Mr. Hentz that he was being disruptive and needed to go home, thereby putting him on suspension, and Mr. Hentz left. Tr. 564:22-565:5; 615:6-13, 620:1-6. The time between Mr. Morrison first seeing Mr. Hentz and having the above-referenced exchange was less than 4 minutes, which is consistent with Mr. Hentz’s time records for December 9, 2016, which show him having clocked out at 2:30 pm. Tr. 571:2-14; 609:3-9. Thereafter, Mr. Morrison contacted PruittHealth’s Human Resources Department again for guidance, and Ms. Ellis reported she would be in the facility in a few days and available to discuss then. Tr. 538:1-7. Notably, Mr. Hentz denies the encounter with Mr. Morrison described above and, instead, claims he was only at work for 4 minutes on December 9, 2016, because he came to work by “mistake,” realized his “mistake” *after* clocking in, and then went home. Tr. 240:21-41:10; R-7.

## **2. Mr. Morrison Decides to Terminate Mr. Hentz’s Employment.**

With guidance provided by PruittHealth’s Human Resources Department and Ms. Dickens, Mr. Morrison decided to terminate Mr. Hentz’s employment on or about December 12, 2016, due to a pattern of attendance issues. Tr. 37:5-15; 538:24-540:8; 697:10-698:10. In reaching this conclusion, Mr. Morrison reviewed Mr. Hentz’s performance discipline and his time card, including his missed punches and other attendance infractions. Tr. 538:4-7.

Prior to Mr. Hentz’s termination, in the first or second week of December, Mr. Morrison also spoke with Ms. Dickens about (1) Mr. Hentz’s unprofessionalism, (2) the overall volume of complaints received about Mr. Hentz’s unprofessionalism, (3) the mistakes Mr. Hentz had made on the schedule, (4) the fact that Mr. Hentz had walked off a shift, and (5) that his attendance

was inconsistent. Tr. 37:5-39:15; 690:15-695:15. Further, Mr. Morrison advised Ms. Dickens that Mr. Hentz had refused to answer a call light. Tr. 694:1-8. Ms. Dickens and Mr. Morrison reviewed Mr. Hentz's time records at that time. Tr. 695:2-696:25; R-7. Upon reviewing that document, Mr. Morrison observed that Mr. Hentz had a large number of occurrences. Tr. 697:16-19; R-7. At that time, Mr. Morrison discussed terminating Mr. Hentz's employment, and Ms. Dickens supported that decision because of Mr. Hentz's violation of the Attendance Policy. Tr. 698:2-8. Prior to Mr. Hentz's termination, Ms. Dickens was unaware of any complaints Mr. Hentz had raised and never understood Mr. Hentz to have raised any complaints about himself or others. Tr. 698:17-23.

With respect to his attendance, Mr. Morrison expected Mr. Hentz to be at work Monday through Friday from 8 am – 4:30 pm. Tr. 77:23-24; 96:6-10. During his employment, Mr. Hentz came to work late approximately 30 times. Tr. 78:3-6. Mr. Hentz only communicated with Mr. Morrison one time about coming into work late – in that instance, Mr. Hentz had car trouble and Mr. Morrison excused his late arrival for the day. Tr. 78:12-18. The remaining 29 late arrivals were not excused. Tr. 79:3-5. Mr. Hentz admits he does not recall ever requesting preapproval to not take a lunch break. Tr. 194:6-8. From Mr. Morrison's perspective, Mr. Hentz "came and went as he pleased," and studying the dates and times of Mr. Hentz's absences, Mr. Morrison believed that Mr. Hentz was taking advantage of times when Mr. Morrison was out of the facility and Ms. Dickens was new in her role. Tr. 508:10-20. Mr. Morrison was unaware of any circumstance that would cause any of the days that Mr. Hentz was out to be excused. Tr. 562:8-10. Although Mr. Morrison had spoken with Mr. Hentz about his actions, Mr. Hentz would at times walk away mid-conversation. Tr. 509:3-6. Relevant to the termination decision was the fact that when Mr. Morrison spoke with Mr. Hentz about his concerns, Mr. Hentz did not

appear to be absorbing the information, listening to the feedback provided, or taking steps to change his behavior. Tr. 39:3-15.

Mr. Morrison spoke with Missy Ellege, HR Director, and Tammy Ellis, Regional Partner Services Manager in Ms. Ellege's office in the Veterans' Home. Tr. 432:2-3; 538:1-16. Mr. Morrison discussed that Mr. Hentz had demonstrated both performance problems and attendance violations. Tr. 432:4-11; 538:1-16. In those situations, Ms. Ellis typically focuses on attendance issues because, in her view, they are easier to establish and less subjective. Tr. 432:7-11, 538:1-7. During this conversation, Ms. Ellege, Ms. Ellis, and Mr. Morrison reviewed Mr. Hentz's Attendance Record together. Tr. 432:4-11; R-7. In so doing, they noticed that, after previous disciplinary counseling, Mr. Hentz continued to have attendance infractions, including multiple short lunches, long lunches, and no lunches. Tr. 432:21-25; R-7. Based on the attendance issues, Ms. Ellis recommended termination. Tr. 433:1-4. Mr. Morrison advised Mr. Hentz of his termination on the phone that he was being terminated for attendance, and he issued Mr. Hentz a termination document on December 13, 2016, listing a pattern of infractions. Tr. 59:10-23; 92:1-2; 540:2-541:21; 610:12-611:2.<sup>7</sup>

At the time of his termination, Mr. Hentz had been at the facility only approximately 90 days. Tr. 85:2-4. Mr. Morrison considered Mr. Hentz's short tenure further relevant to the termination decision. Tr. 85:2-15. During Mr. Morrison's discussions with Ms. Ellege, Ms. Dickens, and Ms. Ellis, there was no discussion about any prior concerns Mr. Hentz had raised. Tr. 539:10-22.

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<sup>7</sup> Mr. Hentz did not adhere to his suspension as of December 9, 2016, and reported to work on December 13, 2016, unbeknownst to Mr. Morrison (and for reasons that are unclear). Tr. 564:16-565:2, 609:12-13. According to Mr. Hentz, he had a conversation with Case Mix Coordinator Jackie Walker on that date regarding staffing. Tr. 262:19-242:3. However, Mr. Morrison did not overhear that conversation or talk with Ms. Walker about it. Tr. 242:1-4, 566:10-567:2. Two other employees reportedly involved in that discussion, Heather Long and Danielle Jeter, admit they never spoke with Mr. Morrison about anything they heard Ms. Walker or Mr. Hentz say. Tr. at 269:12-270:4.

### **3. Mr. Morrison Lacks Knowledge of Any Group Concerns or Complaints Mr. Hentz Had Raised.**

When Mr. Hentz was terminated, Mr. Morrison knew Ms. Mervin had conducted an investigation regarding Mr. Hentz. Tr. 84:9-23; 556:12-17; 621:4-10. But Ms. Mervin did not disclose to Mr. Morrison, and Mr. Morrison did not know, the details of what she had investigated or anything about the types of allegations Mr. Hentz had raised. Tr. 84:21-23; 556:9-11; 621:4-10. Mr. Morrison did not know what Mr. Hentz reported to Ms. Mervin in that investigation or what information, if any, the company shared with Mr. Hentz during that investigation. Tr. 556:9-17.

Prior to Mr. Hentz's termination, Mr. Morrison *never* understood Mr. Hentz to have raised concerns on behalf of anyone other than himself. Tr. 556:2-8. Mr. Morrison only learned of Mr. Hentz's complaints of race discrimination several months before the administrative hearing on September 12, 2017, before Judge Locke when employees started saying to Mr. Morrison that a lawyer had contacted them asking questions. Tr. 557:1-15. No one ever indicated anything to Mr. Morrison prior to that date about Mr. Hentz having complained of race discrimination. Tr. 557:11-13.

### **4. False Statements About Mr. Morrison.**

Contrary to allegations raised in the Complaint, Mr. Morrison never made a statement to the effect of "This is my building and I'll do what the f- I want." Tr. 557:24-558:4. Further, contrary to statements made in this proceeding, Mr. Morrison:

- does not make employment decisions based on race or whether employees raise concerns;
- never told Mr. Hentz he could come to work whenever he wanted, provided his job was done;
- never said he was "tired of Ricky's shit;"

- has never thrown his pen at work; and
- has never cursed at an employee at work.

Tr. 557:14-558:4; 565:20-568:24. Further, approximately every couple of weeks or monthly, partners in the Veterans' Home commented to Mr. Morrison about the color of his skin—specifically, his face appearing “red” colored, and perhaps angry. Tr. 567:21-25. While that may have been true on occasion, it was common for Mr. Morrison to hear that statement when he was not angry. Tr. 568:16-20.

#### **D. EVENTS REGARDING ALLEGATIONS IN THE COMPLAINT.**

##### **1. Mr. Morrison Has Enforced the Attendance Policy.**

According to Respondent's records, a multitude of discipline was issued out of the Veterans' Home in 2016 and 2017 by numerous managers. R-11. For example, Mr. Morrison disciplined his direct report David Creasman, then-Environmental Manager, on April 5, 2017, for not consistently enforcing the Attendance Policy, stating:

Partner was directed to discipline all employees equally. One of your employees violated attendance policy and you were directed to do a write-up, written disciplinary notice. This has still not been completed. Must discipline all partners based on our policy and that alone.

Tr. 549:17-21; R-11. Further, when Ms. Dickens was out of the facility, Mr. Morrison also disciplined one of her direct reports, Ahmad Gaines, for not following the Attendance Policy.

Tr. 544:21-545:8; R-11. Mr. Morrison also terminated CNA Mary Shelton for violation of the Attendance Policy, stating,

Since your final written warning of 4/17/17, you were tardy April 28th, 29th, and 30th. This is unacceptable behavior. Our residents count on us to provide timely care and when you are not here or tardy, that leaves them vulnerable.



Tr. 551:11-15; R-11. Mr. Morrison also issued discipline under the Attendance Policy to Erica Ammons, Restorative CNA, and CNA Amy Conrad. Tr. 552:6-553:3. There is no record evidence showing or even suggesting that Ms. Shephard, Mr. Creasman, Mr. Gaines, Ms. Shelton, Ms. Ammons, or Ms. Conrad engaged in any complaints or raised any concerns, for or regarding Mr. Hentz, or on behalf of themselves or others.<sup>8</sup>

**2. Ms. Penland Requests Reconsideration for Employment Following Mr. Hentz's Termination.**

In approximately July 2017, Ms. Penland called Ms. Dickens asking to be reconsidered for employment, saying again that she had resigned because of Mr. Hentz's unprofessional behavior. Tr. at 683:16-21.

**III. ARGUMENT**

**A. The General Counsel Fails to Establish That the Discipline and Termination of Mr. Hentz Were Because of His Protected, Concerted Activity in Violation of Sections 8(a)(1) OR 8(a)(3) of the Act.**

**1. Applicable Legal Standards**

Allegations of discriminatory discipline and/or termination in violation of Section 8(a)(1) and (3) have long been reviewed under the analytical framework established in Wright Line, 251 NLRB 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). Under Wright Line, the General Counsel has the initial burden to show by a preponderance of the evidence:

- (1) the employee's protected activity;
- (2) the employer's knowledge of the activity;
- (3) that the affected employee suffered an adverse employment action; and

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<sup>8</sup> Ms. Dickens had also commonly approved for employees who reported to her (e.g., Frank McIlrath and Cynthia Loftus) the taking of short lunches based on information those employees provided about their work-related responsibilities. Tr. 74:9-75:7; 701:21-703:16.

(4) that the protected activity was a substantial or motivating reason for the adverse action.

See *id.* at 1089; see also NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 400 n.5 (1983). If the General Counsel establishes this *prima facie* case, the burden shifts to the employer to demonstrate a “legitimate business reason” or justification for the action or otherwise demonstrate that it would have taken the same action even in the absence of the employee’s protected activity. *Id.* at 1088; see also Palms Hotel & Casino, 344 NLRB 1363, 1363 (2005) (finding lawful a written warning because employer proved that it would have issued warning even absent protected conduct). If the employer makes that showing, the burden shifts back to the General Counsel to show that Respondent’s claimed reason for the discipline or discharge was pretextual. Flamingo Las Vegas Operating Co., 360 NLRB No. 41 (2014) (General Counsel did not establish pretext where employer sufficiently explained reasoning behind employee’s discipline). Fundamentally, the burden remains on the General Counsel to establish (a) disparity of treatment between the alleged discriminatee and other employees who have engaged in the same misconduct, but not engaged in protected activity, and (b) that the reason for the disparity of treatment was the protected activity. GHR Energy Corp., 294 NLRB 1011, 1014 (1989) (no violation of Section 8(a)(3) where there was “no showing that the Respondent ever failed to take similar disciplinary action against any other employee” found to have violated the same rule).

## **2. The General Counsel Failed to Establish a *Prima Facie* Case.**

The General Counsel alleges that Mr. Hentz’s final written warning in November 2016, and his termination on December 14, 2016, was discriminatory based on his protected, concerted activity. GC-1 ¶¶ 10, 12. The testimony and evidence introduced at the hearing, however, demonstrate that Mr. Hentz was disciplined and terminated because of his violation of the Attendance Policy. Furthermore, as explained below, the overwhelming preponderance of the

evidence shows that Mr. Hentz did not engage in protected, concerted activity; that the decision-maker, Mr. Morrison, had no knowledge of Mr. Hentz's alleged protected, concerted activity prior to issuing him a final written warning for attendance and terminating his employment after he continued to violate the Attendance Policy; and no credible evidence shows Mr. Morrison took such action based on any unlawful animus. Accordingly, all allegations related to Mr. Hentz's discipline and termination should be dismissed.

**(a) The General Counsel Failed to Establish that Mr. Hentz Engaged in Protected, Concerted Activity for Employees' "Mutual Aid or Protection" by Calling PruittHealth's Corporate Office to Complain of Race Discrimination By Activities Director Amy Ferguson, Discussing Staffing with Case Mix Coordinator Jackie Walker, or Otherwise.**

The General Counsel failed to establish that Mr. Hentz engaged in any protected, concerted activity for employees' mutual aid or protection when he called PruittHealth's corporate office to complain of race discrimination by Activities Director Amy Ferguson, by discussing staffing with Case Mix Coordinator Jackie Walker, or by any of the day-to-day staffing discussions he had with Mr. Morrison or otherwise. To find that an employee has engaged in concerted activity for employees' mutual aid and protection, the Board requires the activity "be engaged in with or on the authority of other employees, and not solely by and on behalf of himself." Meyers Indus. (II), 281 NLRB 881, 885 (1986); Walmart, NLRB Div. of Advice, No. 17-CA-25030 (Sept. 25, 2011) (ALJ held that employer lawfully discharged employee because employee's individual gripe did not rise to concerted activity under the Act).

In Fresh & Easy Neighborhood Market, Inc., 361 NLRB 12 (2014), a divided Board overruled Holling Press, Inc., 343 NLRB 301 (2004), holding that an employee engages in "concerted activity" for the purpose of "mutual aid or protection" within the meaning of Section

7 when the employee seeks help from coworkers in logging a sexual harassment complaint. In Fresh & Easy, the Board recognized that, whether an employee's activity is "concerted" depends on the manner in which the employee's actions may be linked to those of coworkers. *Id.* The concept of "mutual aid or protection" focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees. *Id.*

The General Counsel has not shown and cannot show that Mr. Hentz's communications to PruittHealth's corporate office, to Mr. Morrison, or otherwise satisfy the requirements for concerted activity for the purpose of mutual aid or protection as articulated in either *Meyers Industries II* or Fresh & Easy. Indeed, the record establishes that Mr. Hentz called PruittHealth's corporate office and complained of race discrimination by the Activities Director Amy Ferguson. Tr. 420:6-10; 376:4-5; 150:1-153:14. Mr. Hentz provided the names of Danielle Jeter and Linda Brinson, who were alleged to have been disciplined on the same day by Ms. Ferguson, but Mr. Hentz stated, "I'm not here to talk about them. I'm here to talk about me." Tr. 420:6-10; 376:4-5; 150:1-153:14. During this investigation, Mr. Hentz stated that he did not feel that Mr. Morrison had discriminated against him, just the Activities Director. Tr. 357:4-9. Mr. Hentz provided no written documentation to Ms. Mervin. Tr. 362:12-16. No evidence shows Mr. Hentz sought assistance from his coworkers in submission of any group complaint to the Veterans' Home. No evidence shows Mr. Hentz to have circulated any petition or to have articulated any change in policy supported by two or more individuals and related to their working conditions. Thus, the General Counsel failed to establish there was any concerted protected activity for employees' mutual aid or protection with respect to Mr. Hentz's call to PruittHealth's corporate office.

Further, the only link to Mr. Hentz's coworkers in the submission of any of his complaints to PruittHealth's corporate office is the reference to their names, and past events allegedly involving them, which is weak and attenuated at best, and insufficient to satisfy the applicable legal standard. In conducting her investigation, Ms. Mervin spoke with numerous individuals, including Ms. Brinson and approximately 8-10 other individuals, and none of them expressed any support for Mr. Hentz or his concerns. Tr. 414:18-21. Notably, Ms. Mervin reached out to Ms. Jeter on several occasions, but Ms. Jeter refused to return Ms. Mervin's calls (and, in fact, had no obligation to do so). Tr. 364:9-17. Ms. Brinson was willing to speak with Ms. Mervin, and referenced being disciplined for eating in the assembly room, but said she did not believe the issues were tied to race and, instead, thought that Ms. Ferguson lacked appropriate management skills and did not understand how to set goals and assessments. Tr. 361:10-362:6. Ultimately, Mr. Mervin concluded that Mr. Hentz's complaint of race discrimination against Ms. Ferguson was unsubstantiated. Tr. 366:15-20; 414:18-415:3; 425:6-10.

Mr. Hentz's communications with Mr. Morrison also fail to establish the requisite link between himself and others or the requisite "mutual aid or protection" element. Mr. Hentz claims he discussed staffing and personnel matters with Mr. Morrison during his employment with the Veterans' Home. According to Mr. Hentz, he had communications about staffing with Linda Brinson, Tiffanie Robinson, Toya Fleming, Marie Williams, Danielle Jeter, Danisa Taylor, and others. Tr. 242:5-243:16. However, as the Scheduler, Mr. Hentz was expected to discuss staffing and personnel matters *because that was his job*. Tr. 461:1-10. In any event, Mr. Hentz never referenced these individuals by name to Mr. Morrison in connection with any concerns or

complaints. Tr. 242:5-243:45; 115:3-9. Mr. Morrison **never** understood Mr. Hentz to have expressed complaints on behalf of anyone other than himself. Tr. 698:20-23.

The General Counsel may argue that Mr. Hentz's statement to Mr. Morrison that they needed to get more staff because employees did not want to work "short" handed is concerted protected activity for employees' mutual aid and protection. *See* Tr. 115:10-15. However, these statements are insufficient to meet the requisite standards. As an initial matter, it is unclear on whose behalf Mr. Hentz appears to have been speaking, whether such individuals had agreed with him. Tr. 698:2-23. In any event, no record evidence suggests that Mr. Hentz was trying to effectuate any change in policy, on behalf of himself or others, and Mr. Hentz admitted that all he considered to be "short" staffing was merely less than what the DHS considered a full schedule. Tr. 245:22-247:3. Mr. Hentz admits that Mr. Morrison responded to him by saying he was working on hiring additional staff. Tr. 115:16-18. Mr. Hentz admits that he did not expect Mr. Morrison to do anything else in response to this communication other than hire additional staff. Tr. 244:5-245:21.

Mr. Hentz's above-referenced communication with Mr. Morrison is not particularly noteworthy. Employees spoke with Mr. Morrison about staffing levels, and which roles needed to be filled, on a daily basis. Tr. 558:20-25; 464:8-24. Like many companies, the Veterans' Home has turnover. Tr. 558:16-25. To recruit new hires, the Veterans' Home had already implemented an incentive program where employees who actively referred someone to join the organization could receive an extra payment. Tr. 559:13-24. Mr. Morrison was unaware of any incentive he would have to keep staffing levels low, and he had no concerns about the staffing levels at the Veterans' Home in the fall or winter of 2016. Tr. 560:8-15. In fact, Mr. Morrison is unaware of any instance in which the Veterans' Home has not met the minimum staffing

expectations set by the government. Tr. 462:8-11. In any event, Mr. Morrison himself discussed staffing levels at operations meetings, with the DHS, with corporate. Tr. 558:1-10. As Mr. Morrison said, “We were always trying to actively recruit staff and our goal was to always be at the five-star staffing level,” which was the highest ranking provided by CMS. Tr. 561:1-6; 457:7-25. In this context, Mr. Hentz’s communications did not demonstrate a sufficient link to other employees, were not directed to any policy change, and did not otherwise constitute protected concerted activity for employees’ mutual aid or protection. See Reynolds Elec. Inc., 342 NLRB 16 (2004) (employee’s continuing questioning of his supervisors about whether job was prevailing wage job not concerted activity where no evidence established employee acting in concert with anyone else).

To the extent that Fresh & Easy is read broadly to render Mr. Hentz’s communications to PruittHealth’s corporate office, to Mr. Morrison, or otherwise concerted protected activity for employees’ mutual aid and protection, then Fresh & Easy should be reversed as an unreasonable application of the Act. The undersigned counsel understands that Judge Locke must uphold the current law as interpreted by the Board. However, to preserve the record for possible future review by the Board and the federal courts, the Veterans’ Home summarizes its position as follows:

- As articulated by Member Miscimarra in his opinion concurring in part and dissenting in part, the majority test articulated in Fresh & Easy fails to correctly interpret Section 7’s threshold requirement that protected conduct be undertaken for the “purpose” of “mutual aid or protection.” The Veterans’ Home incorporates such reasoning by reference.
- Moreover, the expansive reading of the Act’s protections in Fresh & Easy, even if well-intended, will produce adverse consequences in circumstances where the Act should not apply, thereby undermining employers’ interests in regards to sex harassment, race discrimination and other types of complaints and other non-NLRA protection available to employees.
- Section 7 states that employees “shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own

choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” and statutory language must be construed as a whole, and particular words or phrases are to be understood in relation to associated words and phrases. Section 7’s focus on “collective” actions, self-organization, and representation shed light on the “mutual aid or protection” element.

- The Section 7 phrase “concerted activities” contemplates more than the mere presence or involvement of two employees. As Member Miscimarra so aptly observed: “If one person is a witness to somebody else’s car crash, and if they both have a shared interest in avoiding such accidents, this does not mean they have engaged in ‘concerted’ activity. Rather, ‘concerted’ activity takes place, within the meaning of Section 7, only if the conduct involves or contemplates a joint endeavor to be ‘done or performed together in cooperation.’”
- Activity involving two or more employees consisting of “mere talk” must, in order to have Section 7 protection, “be talk looking toward group action.”
- As well-articulated by Member Johnson in his dissenting opinion, Section 7 does not give the Board the authority to act as an “uberagency” without due regard to the enforcement processes established by other laws and agencies.

For these reasons, any holding that finds that Mr. Hentz’s communications with his peers or others constitutes “protected, concerted activity” for employees’ “mutual aid and protection” that oversteps the confines of Board law, or that otherwise expands the scope of protected, concerted activity for employees’ mutual aid and protection, should be found contrary to the Act.

**(b) The Record Establishes That Mr. Morrison Lacked Knowledge of the Substance of Mr. Hentz’s Call to PruittHealth’s Corporate Office, Mr. Hentz’s Staffing Discussions with Case Mix Coordinator Jackie Walker, or Any Other “Group” Complaint Supposedly Raised By or Involving Mr. Hentz.**

Justin Morrison disciplined Mr. Hentz for violation of the Veterans’ Home’s Attendance Policy on November 21, 2016. Tr. 45:13-46:12; 156:1-10; 514:3-23; GC-7 & 10. With the support of the DHS Crysta Dickens and Regional Partner Services Manager Tammy Ellis, Mr. Morrison decided to terminate Mr. Hentz’s employment. Tr. 37:5-7; 540:23-541:2. Mr. Morrison had no knowledge of the content or substance of Mr. Hentz’s call to PruittHealth’s



corporate office before approving Mr. Hentz's termination. Tr. 84:10-85:1; 556:2-17; 621:4-10.

The undisputed record evidence establishes that the decision to terminate was made on or about December 12, 2016. Tr. 37:5-9; 538:24-540:8; 697:10-698:10. Mr. Morrison testified credibly as follows:

Q. When you decided to terminate Mr. Hentz's employment, what did you know about any prior complaints that he had raised to PruittHealth?

A. I was aware that he made a compliance line call because him and I had that conversation, and that I knew that corporate had come in, that Della had come in and spoke with him. That's more or less the extent of it.

Q. Did you know what information was provided during the investigation?

A. No.

Q. You don't know what Mr. Hentz provided – what information Mr. Hentz shared as part of that investigation?

A. No.

Q. And you don't know what information the company shared with Mr. Hentz during that investigation?

A. No.

**Q. Did you – prior to Mr. Hentz's reassignment, did you ever understand Mr. Hentz to have raised any concerns on behalf of anyone other than himself?**

A. No.

**Q. Prior to the decision to terminate Mr. Hentz's employment, did you ever understand him to raise any concerns on behalf of anyone other than himself?**

A. No.

Q. Did you eventually learn of complaints Mr. Hentz had raised?

A. Yes.

Q. Did you eventually learn about Mr. Hentz raising any complaints of race discrimination?

A. Yes.

Q. When did you learn about that?

A. Several months ago, I started to have employees come to my office and state that a lawyer had contacted them and was asking questions about it.

Q. No one had indicated anything to you about Mr. Hentz complain[ing] of race discrimination prior to that date?

A. No.

Q. Nothing about that has been discussed with you?

A. No.

Tr. 556:2-557:15 (emphasis added).

According to Mr. Hentz, he had a conversation with Case Mix Coordinator Jackie Walker<sup>9</sup> on December 13, 2016, in which Mr. Hentz said, “we are short staffed,” and Ms. Walker said, “You guys are not short staffed; two is plenty on the floor,” and Mr. Hentz said no and claimed the residents feel differently. Tr. 176:4-263. However, Mr. Morrison had no knowledge of this conversation. Tr. 566:10-567:2. Mr. Morrison did not overhear that conversation or talk with Ms. Walker or Mr. Hentz about it. Tr. 242:2-4, 566:10-567:6. Two other employees reportedly involved in that discussion, Heather Long and Danielle Jeter, both of whom provided testimony at the hearing, admit they never spoke with Mr. Morrison about anything they heard Ms. Walker or Mr. Hentz say during that conversation. Tr. 269:23-270:4.

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<sup>9</sup> There is no record evidence that Case Mix Coordinator Jackie Walker is a 2(11) Supervisor or a member of management.

Obviously, knowledge of protected activity is a necessary ingredient of a violation of Section 8(a)(3) of the Act and must be shown to have existed before an unfair labor practice within the meaning of that section can be said to have occurred. Pembek Oil Corp., 165 NLRB 367, 373 (1967). As such, there can be no inference of discrimination and all allegations related to Mr. Hentz's discipline and termination should be dismissed. Carry Cos. of Illinois, 311 NLRB 1058, 1066 (1993) (refusing to infer knowledge of protected activity where an inference of knowledge would be speculative).

**(c) The General Counsel Failed to Establish that Any Animus Over Alleged Concerted Protected Activity Motivated the Issuance of a Final Warning or the Termination Decision.**

The General Counsel failed to establish that any animus over alleged concerted protected activity motivated the issuance of a final warning to Mr. Hentz or the decision to terminate his employment. As Mr. Hentz himself acknowledged, on December 5, 2016, Mr. Morrison said to him, "Ricky, I don't want you to think that I don't want you to work here." Tr. 164:2-24. If Mr. Morrison had harbored any animus against Mr. Hentz, Mr. Morrison could have terminated Mr. Hentz's employment later that day when Mr. Hentz raised his voice, threw his arms around, said he had to leave, could not deal with the situation, and stormed out of Mr. Morrison's office, leaving work at 3:07 pm, behavior that Mr. Morrison considered unprofessional. Tr. 530:11-532:2; R-7. However, Mr. Morrison did not, because he assumed Mr. Hentz would calm down, as he had in the past, even though Mr. Morrison understood his supervisor, Dawn Wilson, and HR Manager Tammy Ellis, to believe that Mr. Hentz's actions should have been interpreted as a resignation. Tr. 533:2-534:4.

The General Counsel may argue that animus is established based on testimony from Jennifer Horton that, in a meeting with her, Ms. Dickens, and Mr. Morrison, Mr. Morrison

appeared to be upset, or as the General Counsel's witness described him, "red," and that Mr. Morrison said, "I'm tired of Ricky's shit." Tr. 286:11-21. However, Mr. Morrison credibly denied ever stating that he was "tired of Ricky's shit," and Ms. Dickens corroborated that Mr. Morrison never made any such statement in her presence or otherwise along those lines. Tr. 565:20-21, 704:11-16.

Ms. Horton (who considers herself a friend of Mr. Hentz's) further claimed in her testimony that, in a meeting between only Mr. Dickens and herself, that Ms. Dickens said that PruittHealth's corporate office had advised them to "let [Mr. Hentz] go slowly because he can be dangerous and to document appropriately." Tr. 287:10-17; 298:15-16. Ms. Horton purportedly inferred the discussion was about Mr. Hentz because it followed a conversation she had had recently in Mr. Morrison's office about Mr. Hentz. Tr. 287:15-17. However, Ms. Dickens credibly denied making that statement or any statement along those lines. Tr. 704:1-6. As Judge Locke may recall from his own observations of Ms. Horton's testimony and her demeanor, she appeared more so than any other witness on the stand to be tense, defensive, and angry, and she acknowledged that PruittHealth had involuntarily terminated her employment on terms about which she was unhappy. Tr. 294:25-295:3, 298:12-14. For all those reasons, Ms. Horton's testimony should be afforded little to no weight.

Even if Ms. Horton's testimony is to be believed (which it should not), there is still no evidence of animus because, as Ms. Horton stated, after supposedly referring to being tired of Mr. Hentz's "shit," Mr. Morrison (per Ms. Horton) then said, "It's always something with him. He is causing trouble with the CNAs, the RNs, and now the patients. He's got to go. I'm firing him." Tr. 291:5-7. No evidence establishes that this statement referred to any concerted, protected activity for anyone's mutual aid or protection. Indeed, nothing links that statement to

any group petition, proposed policy change, or other protected activity. Rather, on its face, the statement appears to be referencing the numerous (in Ms. Gray's estimation – approximately 30) employees who had complained about Mr. Hentz, concerns that Ms. Gray relayed to Mr. Morrison. Tr. 651:22-652:13. As the credible evidence offered established, Mr. Hentz did cause trouble with a resident, when a resident on December 9, 2016, appearing sincere and in need (and having never complained before to Mr. Morrison's knowledge about any other partner) reported that he did not want Mr. Hentz to care for him anymore because Mr. Hentz would reportedly see his call light, turn it off, and walk away without providing services. Tr. 535:23-23. Such behavior is obviously unacceptable in a facility that embraces a "committed to caring philosophy" and aims, as the Veterans' Home does, to be a five-star rated facility by the Centers for Medicare Services. Tr. 15:6-7, 453:15-22; 561:1-6; 457:7-25.

Mr. Morrison's immediate reaction to this resident's reported concern, his immediate confrontation of Mr. Hentz about that reported concern, coupled with Mr. Hentz's 26-minute late arrival on December 9, 2016, all credibly explain why Mr. Morrison contacted PruittHealth's Human Resources Department for guidance at that time to discuss Mr. Morrison's legitimate concerns about Mr. Hentz's performance and attendance. Tr. 536:24-538:21. Mr. Hentz's explanation of the events of December 9, 2016 – that he came to work by "mistake" that day, realized the "mistake" only *after* clocking in at 2:26 pm and went home – is not credible, and such contrived explanation should serve to undermine the weight afforded to Mr. Hentz's testimony in its entirety. Tr. 240:21-241:10; R-7.

Further undercutting Mr. Hentz's credibility is the fact that he cannot keep his stories straight. For Example #1: Mr. Hentz testified to inconsistent events on December 5, 2016, after learning of his assignment to a CNA role. First, he stated under oath that he told Mr. Morrison

he would think about the offer, that Mr. Morrison said “ok,” that he left Mr. Morrison’s office, and went back to work. Tr. 164:2-24. But, upon being confronted with Veterans’ Home’s time card records showing Mr. Hentz clocked out at 3:07 pm that day, Mr. Hentz then claimed instead that Mr. Morrison came into his office, snatched his things, and told him to clock out and go home. Tr. 238:11-239:2; R-7. As Example #2: in a statement Mr. Hentz provided to the Region during its investigation, Mr. Hentz referred to having worked on December 8 and December 9, 2016, then being off the following weekend. Tr. 255:3-9. Mr. Hentz tried to blame his lawyers for this mistake. Tr. 255:10-16. Mr. Hentz now admits, contrary to the representation in his affidavit, that he did not work on December 9, 2016. Tr. 255:17-22. Of course, further bearing still on Mr. Hentz’s credibility as a whole was and is Example #3: the extraordinary nonchalance by which Mr. Hentz, when questioned about his missing punch on November 15, 2016 (for which Mr. Hentz completed a missing punch form, representing therein that he started lunch at 11:17 and ended lunch on 11:47), stated: “[this] could have been one of the times in which I actually didn’t get a lunch but it was easier to say I did” than to have to speak with Mr. Morrison. Tr. 210:9-211:8; R-3.

The General Counsel may argue that animus is established based on testimony that the Veterans’ Home has told employees they cannot talk about staffing issues. Tr. 313:14-20. However, Ms. Ellis and Ms. Dickens credibly explained that the Veterans’ Home expects that the information partners provide to residents’ family members is factual and accurate. Tr. 461:14-462:11. No one at the Veterans’ Home has ever been disciplined for statements about staffing. Tr. 466:4-6. The Veterans’ Home’s instructions are merely a request that employees not make excuses for not doing their jobs and, instead, provide truthful and accurate information when a

resident's loved one asks why a friend or family member did not get, say, a bath or shower or other service provided in the Veterans' Home.<sup>10</sup>

In reality, Mr. Morrison issued Mr. Hentz a final written warning due to his attendance infractions and terminated Mr. Hentz's employment because he continued to violate the Attendance Policy. Tr. 513:24-514:10; GC-7 & 10. Upon review of Mr. Hentz's time card report in December 2016, including his missed punches and other attendance infractions, Mr. Morrison observed that Mr. Hentz's attendance:

- was inconsistent; Tr. 37:5-39:15; 690:23-695:4.
- that Mr. Hentz had a large number of occurrences; Tr. 697:16-19; R-7.
- that Mr. Hentz "came and went as he pleased;" Tr. 508:10-20.
- and, in studying the dates and times of Mr. Hentz's absences, Mr. Morrison believed that Mr. Hentz was taking advantage of times when Mr. Morrison was out of the facility and Ms. Dickens was new in her role. Tr. 508:10-20.

During his employment, Mr. Hentz came to work late approximately 30 times. Tr. 78:3-6. Mr. Hentz only communicated with Mr. Morrison one time about coming into work late – in that instance, Mr. Hentz had car trouble and Mr. Morrison excused his late arrival for the day. Tr. 78:12-22. The remaining 29 late arrivals were not excused. Tr. 79:3-5. Mr. Hentz admits he does not recall ever requesting preapproval to not take a lunch break. Tr. 194:6-8. Although Mr.

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<sup>10</sup> The Complaint contains no allegation that the Veterans' Home maintains any prohibited policies regarding staffing discussions. GC-1. Presumably, this is so because under well-established law, conduct that is so openly disloyal loses protection under the Act. Jefferson Standard, 364 U.S. 464, 471 (1953). Here, the Veterans' Home's request that, in the context of a question as to why a resident did not receive a care-related service (such as a shower or bath), that partners not make excuses, and instead provide factually accurate information is exceedingly reasonable. It is not overly broad and would not reasonably dissuade someone in the exercise of their Section 7 rights. Further, any statement by a partner to family members, friends, and affiliates of the Veterans' Home's residents regarding alleged "short staffing" would amount to a sharp, public disparaging attack on the quality of the Veterans' Home's services, distributed during a critical time in the Veterans' Home's operations, and in a manner reasonably calculated to harm the Veterans' Home's reputation and reduce its income. The Veterans' Home has at all times during Mr. Morrison's tenure been staffed well above legal minimums. Tr. 325:1-15; 462:2-11; 677:15-678:10. Accordingly, representations to family members, friends, or others affiliated with residents about "short staffing" at the Veterans' Home fall outside the Act's protection. See id.

Morrison spoke with Mr. Hentz about his actions, Mr. Hentz would at times walk away mid-conversation. Tr. 509:3-6. From Mr. Morrison's perspective, also relevant to the termination decision, was the fact that when Mr. Morrison spoke with Mr. Hentz about his concerns, Mr. Hentz did not appear to be absorbing the information, listening to the feedback provided, or taking steps to change his behavior. Tr. 39:10-15. Mr. Morrison advised Mr. Hentz of his termination on the phone that he was being terminated for attendance, and he issued Mr. Hentz a termination document on December 13, 2016, listing a pattern of attendance infractions. Tr. 59:13-23; 92:1-2; 540:11-541:2; 610:12-611:5.

At that time, Mr. Hentz had been employed by the Veterans' Home only approximately 90 days. Tr. 85:2-4. Mr. Morrison considered Mr. Hentz's short tenure further relevant to the termination decision, and the record evidence reveals no partner reporting to Mr. Morrison who had the same violations as Mr. Hentz in such a short timeframe. Tr. 85:2-15.<sup>11</sup> During Mr. Morrison's discussions with Ms. Ellege, Ms. Dickens, and Ms. Ellis, there was no discussion about any prior concerns Mr. Hentz had raised. Tr. 539:9-22.

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<sup>11</sup> The General Counsel offered no evidence at the hearing as to any other employee's late arrivals. The General Counsel further offered no evidence of the missed punches of Mr. Morrison's direct reports, aside from those of Ricky Hentz and Activities Director Amy Ferguson from November 6-19, 2016. Tr. 636:8-637:24. In response, Mr. Morrison spoke with Ms. Ferguson about the instances in which she had reportedly not followed the Attendance Policy. Tr. 636:14-637:18. On several occasions, Ms. Ferguson was out of the building for an activity, such as a restaurant or for a resident outing, such as to an apple orchard. Tr. 637:13-18. Mr. Morrison approved Ms. Ferguson having short lunches in these instances because she told him about them in advance and would give him a calendar for a month or a couple weeks of upcoming issues to obtain pre-approvals for short lunches. Tr. 637:13-18. In contrast, Mr. Hentz never obtained a pre-approval to take a lunch break shorter than 30 minutes. Tr. 637:22-24. Record evidence of short lunches, standing alone, does not reveal whether short lunches were pre-approved. Tr. 49:1-20; 501:11-24. At the hearing, Mr. Hentz testified to only one time in which he reportedly sought authorization to avoid having to take a lunch, and that was on November 14, 2016, when he claimed he went to a VA hospital and Jennifer Horton signed a form for him. Tr. 157:11-161:7. However, Mr. Morrison credibly testified that Ms. Horton lacked the authority to approve Mr. Hentz leaving the building for a matter such as this. Tr. 561:10-12. Both Mr. Morrison and Ms. Dickens testified that Mr. Hentz never spoke with them to obtain any such approved leave on November 14, 2016. Tr. 157:7-161:3; 561:22-562:7; 704:17-705:12. Thus, there is no credible reason to believe that a short or missed lunch on November 14, 2016, should have been excused or that, even if this isolated instance had been excused, Mr. Hentz's overall pattern of attendance infractions would have been dramatically different.



The General Counsel has not produced any substantial, non-speculative evidence to show that Mr. Hentz's violation of the Attendance Policy was not the true reason for his final written warning or subsequent termination, and instead that the Veterans' Home was motivated by animus over protected, concerted activity for employees' mutual aid and protection. In fact, Mr. Morrison has disciplined his direct report, the then-Environmental Manager David Creasman, and terminated the employment of the former DHS Mary Ellen Shephard, who also reported to him, in part, for not enforcing the Attendance Policy. Numerous other individuals have also been disciplined for violation of the Veterans' Home Attendance Policy. R-11.

Mr. Hentz is apparently attempting to use his communications to PruittHealth's corporate office, his discussion with Case Mix Coordinator Jackie Walker, and his own day-to-day discussions about staffing (which were part of his job responsibilities as a Scheduler/CNA) as a shield to the consequences of his own violations of the Attendance Policy. Yet, the law is clear that Mr. Hentz cannot hide behind the Act in such a way. Standard Products Co. v. NLRB, 824 F.2d 291, 293 (4th Cir. 1987) ("the Act is not a shield" from the consequences of misconduct or poor performance).

Regardless, Mr. Morrison held Mr. Hentz and his former manager, Ms. Shephard accountable for their actions *before* Mr. Hentz's call to PruittHealth's corporate office on November 7, 2016. Ms. Shephard's employment ended October 31, 2016. J-1 at 2, #7; Tr. 76:8-16; 467:6-24; 671:16-672:6. Mr. Morrison terminated Ms. Shephard's employment for several reasons, including her not holding partners accountable under the Attendance Policy. Tr. 76:1-3; 467:6-19. Further, Mr. Morrison discovered numerous instances in which the schedule Mr. Hentz had created was not accurate, and Ms. Shephard had failed to hold Mr. Hentz accountable for that. Tr. 492:2-14. After Ms. Shephard's termination, Mr. Hentz would have reported to new-hire

Crysta Dickens, but instead Mr. Morrison directed Ms. Dickens to first learn PruittHealth's policies and procedures, and Mr. Morrison agreed to manage Mr. Hentz's employment. Tr. 77:17-22; 468:2-18. Accordingly, there was and is no reason to expect Mr. Morrison to have disciplined Mr. Hentz for his poor attendance and poor performance prior to October 31, 2016 (because he was reporting to Ms. Shephard then), and no reason to anticipate that Mr. Morrison would not be holding Mr. Hentz accountable on and after October 31, 2016, which was a week *before* Mr. Hentz called PruittHealth's corporate office on November 7, 2016. Further, before Ms. Mervin's investigation was completed, Mr. Hentz himself acknowledged to Ms. Mervin that nurses were complaining about him, and that Mr. Morrison had already coached and disciplined him. Tr. 362:10-363:13; 400:5-10; 402:6-19. All of these facts are inconsistent with any suggestion that Mr. Hentz's call to PruittHealth's corporate office caused Mr. Morrison to hold Mr. Hentz accountable. For these reasons, the General Counsel failed to establish a *prima facie* case of discrimination and all allegations related to Mr. Hentz's final written warning and termination should be dismissed.

### **3. The Veterans' Home Had Legitimate Business Reasons for Issuing a Final Written Warning and Discharging Mr. Hentz.**

Even if the General Counsel had established a *prima facie* case, which it failed to do, the evidence at the hearing demonstrated that the Veterans' Home had legitimate business reasons for issuing Mr. Hentz a final written warning and terminating Mr. Hentz's employment and would have taken the exact same actions even in the absence of any protected activity. See Wright Line, 251 NLRB at 1088; Palms Hotel, 344 NLRB at 1363 (finding that a written warning lawful because employer proved that it would have issued that warning even in the absence of protected activity).

As discussed above, PruittHealth has an Attendance Policy about which it has frequently reminded employees and held them accountable for adhering to. Tr. 213:14-21; 502:14-503:24; 506:13-507:24; 573:17-575:4; 636:14-23; R-4; GC-8; R-11. Mr. Hentz's 29 unexcused tardies in approximately three months, numerous missed punches, and multiple short lunches without pre-approval clearly violated that Policy. Tr. at 79:3-5; 194:6-11; 205:5-15; 207:15-18; 210:9-212:17; 216:2-218:21; 220:14-224:16; 511:1-512:12; 636:14-19; R-3, R-7, GC-17. On December 8, 2016, Mr. Hentz clocked in 13 minutes late to work, and on December 9, 2016, clocked in 26 minutes late to work. Tr. 239:20-24; R-7. In light of the Veterans' Home's obligations to provide care for its residents 24/7, and the consequences that could result if a CNA did not properly report to work on time, the Veterans' Home had no meaningful choice but to terminate Mr. Hentz's employment. Tr. 257:8-3. In reality, Mr. Morrison decided to issue Mr. Hentz a final written warning due to the pattern of attendance violations Mr. Hentz had demonstrated and terminated Mr. Hentz's employment based on Mr. Hentz's continued failure to follow the Policy. Tr. 37:5-22, 513:24-514:10; 538:24-540:8; 697:10-698:10; GC-7 & 10. Therefore, the Veterans' Home had a legitimate reason for Mr. Hentz's final written warning and termination, and all allegations related to Mr. Hentz's final written warning and termination should be dismissed. See McKesson Drug Co., 337 NLRB 935, 937 n.7 (2002) (employer need only show "that it had a reasonable belief that the employee committed the offense, and that it acted on that belief"); Ryder Dist. Resource, Inc., 311 NLRB 814, 816-17 (1993) ("The crucial factor is not whether the business reasons cited by [the employer] were good or back, but whether they were honestly involved and were, in fact, the cause [for the action taken].").

#### **4. The General Counsel Did Not Establish That the Veterans' Home's Legitimate Reason Was Pretextual.**

There is no evidence of pretext to cast doubt on the reason for Mr. Hentz's final written warning or termination or the motive of the Veterans' Home in issuing the final written warning or in terminating Mr. Hentz's employment. To establish pretext, General Counsel may argue that the Veterans' Home treated Mr. Hentz differently than it treated other employees who took short lunches.<sup>12</sup> At the hearing, the General Counsel questioned Mr. Morrison about short lunches taken by other employees from June 1, 2016 through April 3, 2017. Tr. 63:12-69:6; 632:25-635:18; GC-17. However, any attempts by the General Counsel to equate those employees' alleged conduct with Mr. Hentz's should be disregarded. The General Counsel cannot show that those employee' alleged conduct is the same as the conduct for which Mr. Hentz was terminated. First, the General Counsel offered no evidence showing that any such employees, except for Amy Ferguson, reported directly to Mr. Morrison (such that he would have been responsible for holding them accountable). Second, the General Counsel offered no evidence that any of those employees had accumulated 29 or more tardies in a period of approximately 90 days, which Mr. Hentz had. Third, the General Counsel offered no evidence of any of those employees leaving work early, as Mr. Hentz did on December 5, 2016, or otherwise "coming and going as they pleased," as Mr. Morrison understood Mr. Hentz had. Fourth, the General Counsel offered no evidence of those employees' missed punches, despite evidence that Mr. Hentz had numerous missed punches. Fifth, the evidence established at the hearing showed that, while other employees had short lunches from time-to-time, some of those short lunches were pre-approved by their manager based on extenuating circumstances, including (for example

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<sup>12</sup> The same reasons the General Counsel cannot establish animus, which is fatal to its ability to establish a *prima facie* case, also doom the General Counsel's efforts to establish pretext. For simplicity, the Veterans' Home incorporates all such arguments raised in the *prima facie* analysis in its arguments regarding pretext.

with Ms. Ferguson) instances when, between November 6-19, 2016, as the Activities Director she planned trips for the residents, such as to an apple orchard, and shared her calendar with Mr. Morrison and discussed those with him in advance. Tr. 636:24-637:18. In contrast, Mr. Hentz never obtained pre-approval from Mr. Morrison to not take a lunch. Tr. 637:19-24.

In sum, the evidence produced at the hearing demonstrates that Mr. Hentz was issued a final written warning and terminated for violating the Veterans' Home's Attendance Policy and that neither Mr. Hentz's call to PruittHealth's corporate office nor any discussions Mr. Hentz had with Case Mix Coordinator Jackie Walker on December 13, 2016, regarding staffing, nor any of the day-to-day staffing discussions Mr. Hentz had with Mr. Morrison (which were part of his job responsibility as the Scheduler) played any part in those decisions. Because the General Counsel failed to establish that Mr. Hentz's alleged protected activity was the motivating factor for his final written warning and termination, all allegations of the Complaint related to Mr. Hentz's final written warning and termination should be dismissed.

**B. The General Counsel Fails to Establish That the Assignment of Mr. Hentz to a CNA Role Was Because of His Protected Activity in Violation of Sections 8(a)(1) or 8(a)(3) of the Act.**

The General Counsel alleges that Mr. Hentz was removed from his position as a Scheduler/CNA and assigned to a CNA role because of his alleged protected, concerted activity. GC-1 ¶¶ 11, 14. However, the record is clear that Mr. Hentz was reassigned to a CNA role on December 5, 2016, because (1) Mr. Morrison believed that role would better fit his skill set, (2) at that point Mr. Morrison had not received any prior complaints about Mr. Hentz's patient care, whereas there were multiple issues, performance and attendance as a Scheduler/CNA, and (3) as a CNA he Mr. Hentz could choose to work a different shift. Tr. 529:15-530:7. There is no evidence that Mr. Hentz's call to PruittHealth's corporate office or any protected, concerted activity played any role in this decision.

**1. The General Counsel Failed to Establish a *Prima Facie* Case of Discrimination.**

The General Counsel did not establish a *prima facie* case of discrimination because it failed to present any evidence that (1) Mr. Hentz engaged in protected, concerted activity for employees' mutual aid or protection, (2) that Mr. Morrison knew that Mr. Hentz had engaged in protected concerted activity before the decision to assign Mr. Hentz to a CNA position, (3) the transition to a CNA role was an adverse employment action; and (4) any evidence of animus for having engaged in protected concerted activity for employees' mutual aid or protection. Accordingly, all allegations related to Mr. Hentz's reassignment should be dismissed.

**(a) The General Counsel Failed to Establish that Mr. Hentz Engaged in Protected, Concerted Activity for Employees' Mutual Aid or Protection.**

The General Counsel failed to establish that Mr. Hentz engaged in protected, concerted activity for employees' mutual aid or protection. The General Counsel may argue that Mr. Hentz engaged in protected activity by calling PruittHealth's corporate office to complain of race discrimination by Activities Director Amy Ferguson, discussing staffing with Case Mix Coordinator Jackie Walker, or in day-to-day staffing conversations with Mr. Morrison. For the reasons expressed in Section III(A)(2)(a), of this post-hearing brief, and incorporated by reference, the General Counsel cannot make a *prima facie* case of discrimination on those grounds with respect to the decision to assign Mr. Hentz to a CNA position.

**(b) The General Counsel Failed to Establish that Mr. Morrison Knew that Mr. Hentz Engaged in Concerted, Protected Activity on or Before December 5, 2016.**

The General Counsel failed to establish that Mr. Morrison knew that Mr. Hentz had engaged in concerted protected activity for employees' mutual aid or protection on or before December 5, 2016. As explained in Section III(A)(2)(b) of this post-hearing brief, and

incorporated by reference, Mr. Morrison lacked knowledge of the substance of Mr. Hentz's call to PruittHealth's corporate office, and never understood Mr. Hentz to have made any group complaints. Further, the alleged conversation with Ms. Walker occurred on December 13, 2016, which was over a week *before* Mr. Morrison reassigned Mr. Hentz and could not possibly have motivated that decision. Tr. 262:19-242:3; 530:6-14. Therefore, there can be no inference of discrimination and the allegations related to Mr. Hentz's reassignment should be dismissed. *Carry Cos. of Illinois*, 311 NLRB 1058, 1066 (1993) (refusing to infer knowledge of protected activity where an inference of knowledge would be speculative).

**(c) The General Counsel Failed to Establish that the Change from a Scheduler/CNA to a CNA Was a Demotion.**

The General Counsel failed to establish that the change in Mr. Hentz's responsibilities from a Scheduler/CNA to a CNA were a demotion. Indeed, the record evidence shows that the change in responsibilities did not affect his pay. Tr. 530:11-531:14. This change in job responsibilities enabled Mr. Hentz (who had repeatedly been late to work) to choose to work a different shift. Tr. 529:24-530:3. The record evidence does not establish that a CNA was of lesser status or advancement opportunity or that it otherwise amounted to an adverse employment action. Accordingly, the General Counsel has failed to establish a *prima facie* case.

**(d) The General Counsel Failed to Establish that Mr. Morrison Reassigned Mr. Hentz to a CNA Role Because of Protected Concerted Activity.**

The General Counsel failed to establish that Mr. Morrison reassigned Mr. Hentz to a CNA role because of protected concerted activity. Instead, the record evidence establishes that Mr. Hentz did not perform his scheduling duties in an acceptable manner before December 5, 2016. Credible evidence established:

- On a weekly basis, Mr. Morrison instructed Mr. Hentz not to call nurses to require they work as CNAs, but Mr. Hentz did not follow that instruction. Tr. 86:17-88:13; 598:7-23.
- Mr. Morrison understood that Mr. Hentz had refused to call some people who were on an “as needed” or PRN list, even though Mr. Morrison had instructed those personnel to be called. Tr. 88:5-89:3.
- In the fall of 2016, Mr. Morrison received complaints regarding Mr. Hentz’s job performance as a Scheduler, and in a Nursing Supervisors’ Meeting, nurses alleged to Mr. Morrison that Mr. Hentz had harassed and spoken unprofessionally to them, had mishandled scheduling, and had ordered CNAs to report into work. Tr. 485:7-486:10; 486:14-22; 517:8-527:22.
- Also, although Mr. Hentz had no authority to fire or discipline, Mr. Hentz reportedly called a CNA (Carol Penland) and threatened her with termination if she did not report to work on her day off. Tr. 86:6-87:5; 229:5-20; 487:3-10. Ms. Penland reported directly to Mr. Morrison that she felt threatened by Mr. Hentz and would “not work in that environment.” Tr. 603:4-22.
- Ms. Gray credibly testified that, in mid-October 2016, Mr. Hentz, in an authoritative and threatening tone, told her that she was not allowed to change the schedule and that if she did change it, she could be terminated. Tr. 647:24-647:6; 650:11-20. Shortly thereafter, Ms. Gray reported to Mr. Morrison that she was worried about being able to maintain her nursing license based on the information Mr. Hentz had shared. Tr. 648:4-649:1.
- Ms. Gray heard approximately 30 other partners complain about Mr. Hentz, and Ms. Gray shared those complaints with Mr. Morrison, but the problems persisted. Tr. 651:22-652:13; 666:3-668:15.
- On November 4, 2016, Mr. Morrison issued Mr. Hentz discipline for over stepping his bounds as a Scheduler. Tr. 40:5-13; GC-4.
- This discipline was not sufficient to cause Mr. Hentz to improve his job performance because, between December 2 and 4, 2016, Nursing Supervisor Mary Bossenberry reported to Mr. Morrison that there were multiple scheduling errors over the weekend. Tr. 528:1-9, 534:21-22. In researching the matter, Mr. Morrison discovered that Mr. Hentz had put inaccurate information on the schedule. Tr. 528:15-18.

Accordingly, on or about December 5, 2016, after consulting with Ms. Dickens and PruittHealth’s Human Resources Department, Mr. Morrison removed Mr. Hentz’s



responsibilities for scheduling and offered him a position as a CNA. Tr. 163:7-9; 238:10-239:4; 528:25-531:14; 532:3-14.

As previously explained, prior to December 5, 2016, Mr. Morrison had no knowledge of what information, if any, Mr. Hentz reported to PruittHealth's corporate office or what information PruittHealth provided in response, and Mr. Morrison never understood Mr. Hentz to have raised any concerns on behalf of anyone other than himself. Tr. 556:2-557:15. Accordingly, the General Counsel did not meet its burden of establishing that Mr. Morrison decided to reassign Mr. Hentz to a CNA role *because of* Mr. Hentz's call to PruittHealth's corporate office or any other alleged protected activity. Further, the events involving Case Mix Coordinator Jackie Walker did not occur until December 13, 2016, and therefore, could not have motivated Mr. Morrison to reassign Mr. Hentz on December 5, 2016. There is no credible basis by which to believe that any of Mr. Hentz's day-to-day discussions about staffing motivated his reassignment for the reasons explained in Section III(A)(2)(c) and incorporated herein by reference. The evidence and testimony of record does not support any causal connection between Mr. Hentz's alleged protected activity and his reassignment to a CNA role.

Indeed, the only evidence offered by the General Counsel is the temporary proximity between the date of that decision (December 5, 2016) and the date on which Ms. Mervin conducted her investigation into Mr. Hentz's concerns (November 21, 2016). However, temporal proximity of discipline or discharge decisions and protected activity alone is insufficient to prove a causal nexus. See Simmons Co., 314 NLRB at 725 (citing Farmer Bros. Co., 303 NLRB 638, 649 (1991)). Otherwise, protected activity would make an employee bulletproof from the consequences of their own misbehavior – which is certainly not the case. Standard Products Co. v. NLRB, 824 F.2d 291, 293 (4th Cir. 1987) (“the Act is not a shield” from consequences of

misconduct or poor performance). In summary, the General Counsel offers nothing more than temporal proximity and sheer speculation in its effort to tie Mr. Hentz's reassignment to his alleged protected, concerted activity. Therefore, the General Counsel has failed to prove its *prima facie* case and the allegations related to Mr. Hentz's assignment to a CNA role should be dismissed.

**5. The Veterans' Home Had Legitimate Business Reasons Unrelated to Mr. Hentz's Alleged Protected, Concerted Activity to Reassign Him to a CNA Role.**

Even if the General Counsel had established a *prima facie* case, which it has not, the evidence at the hearing demonstrated that the Veterans' Home had legitimate business reasons for reassigning Mr. Hentz to a CNA role and would have taken the exact same actions even in the absence of any protected activity. See Wright Line, 251 NLRB at 1088; Palms Hotel, 344 NLRB at 1363 (finding that a written warning lawful because employer proved that it would have issued that warning even in the absence of protected activity). Simply put, the record established a succession of complaints about scheduling errors and unprofessional communications by Mr. Hentz, including scheduling errors between December 2-4, 2016, that any reasonable observer would conclude would likely result in a short time employee's ultimate reassignment or other remedial action. Further, the complaints raised about Mr. Hentz's scheduling errors came from disinterested employees or third parties (including Ms. Penland and Ms. Gray) – evidence the Veterans' Home knew and which clearly supported Mr. Morrison's decision. The record is clear that Mr. Morrison reassigned Mr. Hentz based on his own mistakes and poor performance. Therefore, the Veterans' Home established that it had a legitimate reason for Mr. Hentz's reassignment to a CNA position, and the Complaint allegations based on this reassignment should also be dismissed. See Ryder Dist. Resource, Inc., 311 NLRB 814, 816-17 (1993) ("The crucial factor is not whether the business reasons cited by [the employer] were

good or bad, but whether they were honestly invoked and were, in fact, the cause [for the action taken].”); Super Tire Stores, 236 NLRB 877, 877 n.1 (1978) (“Board law does not permit trier-of-fact to substitute his own subjective impression of what he would have done were he in Respondent’s position).

**6. The General Counsel Failed to Establish that the Veterans’ Home’s Legitimate Reasons for Mr. Hentz’s Assignment to a CNA Role Were Pretextual.**

The General Counsel failed to present any evidence that would call into question the Veterans’ Home’s legitimate reasons for Mr. Hentz’s reassignment to a CNA role. The evidence and testimony at the hearing establish that (1) Mr. Hentz failed to follow the instructions given my Mr. Morrison regarding which partners to call and when and how to communicate with them, (2) that Mr. Morrison determined that Mr. Hentz had made scheduling errors between December 2-4, 2016, and (3) that numerous co-workers, including, Ms. Gray (who testified she was fearful that her nursing license would have been jeopardized had she followed Mr. Hentz’s orders and not adjusted the schedule to meet residents’ needs) and Ms. Penland (who reportedly quit based on how Mr. Hentz had spoken to her) complained directly to Mr. Morrison, and (4) Mr. Morrison heard of several other complaints in the Nursing Supervisors Meeting and through Ms. Gray. Mr. Hentz’s poor performance cannot be excused by any alleged protected concerted activity. Such action is not an impenetrable shield against discipline or discharge. 6 West Ltd. Corp., 237 F.3d at 778. The Board has made clear that engaging in protected activities is not “a license to loaf, wander about the plant, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct.” Anheuser-Busch, Inc., 351 NLRB 644, 647-648 (2007) (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., 42 (1947)).

Furthermore, the General Counsel did not show that the Veterans’ Home treated Mr. Hentz differently from other employees or that other employees engaged in the same

performance and were allowed to remain in their roles. Finally, there is no showing that Mr. Morrison did not believe that Mr. Hentz committed the scheduling mistakes and engaged in the unprofessional communications and poor performance that led to his reassignment to a CNA role. See McKesson Drug Co., 337 NLRB 935, 937 n.7 (2002) (an employer need only show “that it had a reasonable belief that the employee committed the offense, and that it acted on that belief”). In sum, the General Counsel failed to establish that Mr. Hentz’s alleged protected activity was a factor in Mr. Morrison’s decision to reassign Mr. Hentz. Therefore, all allegations related to Mr. Hentz’s reassignment to a CNA role should be dismissed.

**7. The General Counsel Failed to Prove by a Preponderance of the Evidence That the Veterans’ Home Violated Section 8(a)(1) by Any Comments Made Regarding Staffing, Wages, and Terms or Conditions of Employment.**

**(a) Legal Standards Governing 8(a)(1) Interference Allegations**

To prove a Section 8(a)(1) interference claim, the General Counsel must establish that the employer engaged in conduct that would reasonably tend to restrain, coerce or interfere with employees’ rights under the Act. Webasto Sunroofs, Inc., 342 NLRB 1222, 1223 (2004) (citing Am. Freightways Co., 124 NLRB 146, 147 (1959)). The General Counsel must prove by a preponderance of the evidence that the actions of the employer were objectively sufficient to restrain, coerce or interfere with employees’ rights under the Act. Cheney Constr., Inc., 344 NLRB 238, 239 (2005) (finding no violation of the Act because objective facts did not prove a violation by a preponderance of the evidence); Fieldcrest Cannon, Inc., 318 NLRB 470, 490 (1995) (“[I]t is well established that the test of interference, restraint, or coercion is not whether it succeeds or fails, but, rather, the objective standard of whether it tends to interfere with the free exercise of employee rights under the Act.”).

**(b) The General Counsel Failed to Present Credible Evidence Regarding the Alleged Violative Statements by Mr. Morrison.**

The Complaint asserts a number of Section 8(a)(1) violations related to statements allegedly made by Mr. Morrison and other employees of the Veterans' Home. Specifically, the claims are that (1) Ms. Shephard and HR/Payroll Coordinator Missy Ellege directed employees not to engage in concerted, protected activity by telling them not to discuss their wages and (2) Mr. Morrison told employees "this is my building and I'll do what the [f-] I want," with respect to staffing concerns, and that he said "stay in your lane" with respect to other employees' concerns about staffing and personnel issues, thereby directing employees not to engage in concerted, protected activity for their mutual aid and protection. GC-1 ¶¶ 6-8. All such claims are baseless and should be dismissed.

**(c) The General Counsel Failed to Establish Any Statement By Mr. Morrison "Objectively Sufficient" to Restrain, Coerce or Interfere with Employees' Rights Under the Act.**

First, the General Counsel claims that Mr. Morrison stated "this is my building and I'll do what the fuck I want." GC-1 ¶ 8. The only witness who testified to hearing this statement was Mr. Hentz. Tr. 119:18-120:1-25. Mr. Hentz claims this discussion occurred in the context of a daily staffing discussion in which he allegedly referenced to Mr. Morrison some CNAs being unhappy with their work assignments. Tr. 120:4-12. Mr. Hentz claimed that, during this exchange, Mr. Morrison threw his pen down. Tr. 120:4-16. Mr. Morrison credibly denied having ever said, "this is my building and I'll do what the fuck I want," making any statement along these lines, or having thrown his pen at work. Tr. 568:21-22.

Mr. Hentz's testimony should be discredited based on key disputed points in this case, including but not limited to Mr. Hentz's far-fetched and inconsistent explanation for the events

on December 9, 2016 (the day he was at work from 2:26 pm until 2:30 pm, and claimed in the affidavit he provided to the Region that he worked that day, but admitted under oath at the hearing before Judge Locke that he did not work that day). Also bearing on Mr. Hentz's overall credibility is his testimony, when questioned about the times he represented to the Veterans' Home that he took a lunch break on November 15, 2016, that this "could have been one of the times in which I actually didn't get a lunch but it was easier to say I did." Tr. 211:2-8; R-3. In sum, Mr. Hentz's uncorroborated testimony about the above-referenced exchange simply cannot be credited in light of Mr. Hentz's overall testimony, which lacks all credibility.

In any event, Mr. Hentz's testimony, even if credited, would not support the finding of any violation of the Act. This single statement attributed to Mr. Morrison was not alleged to have occurred in the context of any protected, concerted activity for employees' mutual aid or protection. No evidence shows Mr. Hentz to have referenced in this context any of his legally protected rights, let alone any Section 7 rights, or to have otherwise cited or referred to the National Labor Relations Act or any other rule, policy, or law. Further, the General Counsel presented no credible evidence as to who supported Mr. Hentz's statement or authorized him to speak on their behalf or what the goal of that statement was. There was no reference to any group petition, proposed policy change, or other group action. In sum, no reasonable person would interpret Mr. Morrison's alleged statement as restraining, coercing, or interfering with employees' rights under the Act. Accordingly, the General Counsel's allegations that such statement violated Section 8(a)(1) of the Act should be dismissed.

Second, the Complaint alleges that Mr. Morrison stated, "Stay in your lane." GC-1, ¶ 8. The only witness who testified to hearing this statement was Mr. Hentz. Tr. 125:14-126:9. Mr. Hentz claims that he reported to Mr. Morrison that an employee named "Brandi" was upset

because another employee “John” got to do something that she was not able to do. Tr. 125:17-126:6. Mr. Hentz claims that Mr. Morrison responded, “Ricky, just stay out of it, stay in your lane, those are Brandi’s problems, tell her to go see Missy, tell her to go see Mary Ellen, you just stay out of it.” Tr. 125:17-126:6. Mr. Hentz claims that he said “okay,” showed Mr. Morrison the schedule and went back to his office. Tr. 126:7-9. Mr. Morrison recalled that in December 2016, he directed Mr. Hentz to “stay in his lane.” Tr. 557:21-558:9. However, he made that statement to direct Mr. Hentz to focus on his work – namely, to work on the schedule, not tell department heads what to do, not threaten his coworkers, or exceed the scope of his practice. Tr. 557:21-558:9

The General Counsel failed to establish that the “stay in your lane” comment violated the Act. This single statement attributed to Mr. Morrison was not alleged to have occurred in the context of any protected, concerted activity for employees’ mutual aid or protection. No evidence shows Mr. Hentz to have referenced to Mr. Morrison any of his or Brandi’s legally protected rights, let alone any Section 7 rights, or to have otherwise cited or referred to the National Labor Relations Act or any other rule, policy, or law. Further, the General Counsel presented no evidence that Brandi directed or authorized him to speak on her behalf. There was no reference to any group petition, proposed policy change, or other group action. Instead, the issue that Mr. Hentz referenced to Mr. Morrison pertained only to a change for “Brandi” in *her* work assignment. In sum, no reasonable person would interpret Mr. Morrison’s alleged statement as restraining, coercing, or interfering with employees’ rights under the Act. Accordingly, the General Counsel’s allegations that such statement violated Section 8(a)(1) of the Act should be dismissed.

**(d) The General Counsel Failed to Establish Any Statement Regarding Wages “Objectively Sufficient” to Restrain, Coerce or Interfere with Employees’ Rights Under the Act.**

The General Counsel failed to establish any statements regarding wages objectively sufficient to restrain, coerce, or interfere with employees’ rights under the Act. The General Counsel presented testimony from Ricky Hentz, Jennifer Horton, and Danielle Jeter who claimed that they were asked to keep their compensation confidential. Tr. 101:12-102:18; 110:8-22; 275:4-6; 310:14-311:18. However, Danielle Jeter testified as follows:

Q. You have in the past heard several employees or partners of Pruitt talking about raises?

A. Yes.

Q. And you’ve heard several employees talking about their compensation?

A. Yes.

Q. Including their salaries?

A. Yes.

Q. Did those individuals seem scared when they were talking about that?

A. Just upset that they didn’t get the rate they hoped for or was promised.

Q. And you don’t know whether anyone has been disciplined for talking about wages?

A. No, I’m not aware.

Q. And you don’t know whether anyone has been terminated for talking about wages?

A. No.

Q. Or compensation?

A. No.



Q. Or raises?

A. No, ma'am.

Tr. 327:19-328:14. Consistent with Ms. Jeter's testimony, both Mr. Morrison and Ms. Dickens credibly testified that the Veterans' Home has no policy prohibiting discussion of wages or terms or conditions of employment, and has never disciplined or terminated anyone for discussing wages or terms or conditions of employment. Tr. 328:1-4, 466:4-17, 679:9-680:4. Given these facts, the General Counsel cannot establish that any request to keep wages confidential was "objectively sufficient" to restrain, coerce, or interfere with employees' rights under the Act.

#### **IV. CONCLUSION**

Based on the foregoing, the General Counsel has failed to meet its burden of proof as to all claims and the Complaint should be dismissed.

DATE: October 31, 2017

OGLETREE, DEAKINS, NASH,  
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*/s/ Jana L. Korhonen*

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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10, SUBREGION 11**

**PruittHealth Veteran Services –  
North Carolina, Inc.,**

**Respondent,**

**and**

**Ricky Edward Hentz, an Individual,**

**Petitioner.**

**Case: 10-CA-191492**

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 31<sup>ST</sup> day of October, 2017, date I have served a copy of the foregoing *Respondent's Post-Hearing Brief* on counsel for Petitioner by depositing same in the U.S. Mail, postage prepaid, and addressed as follows, as well as via Electronic Mail:

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